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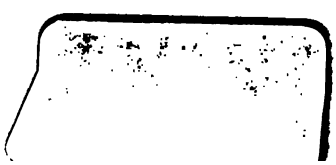


REPORTS

OF

CASES ARGUED AND ADJUDGED

IN THE

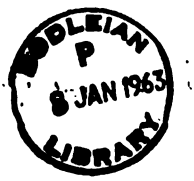
Supreme Court of Florida

AT TERMS HELD IN 1871-'2-'3-'4.

REPORTED BY
WM. ARCHER COCKE, ATTORNEY GENERAL.

VOLUME XIV.

TALLAHASSEE:
PRINTED AT THE OFFICE OF THE FLORIDIAN.
1874.



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DeLand, Florida.

Judges of the Supreme Court

DURING THE TIME OF THESE REPORTS.

HON. EDWIN M. RANDALL, Chief Justice.

HON. JAMES D. WESTCOTT, JR.,
HON. FRANKLIN FRASER,*
HON. R. B. VANVALKENBURG,† } Associate Justices.

WM. ARCHER COCKE, Attorney General.

LYMAN B. FOSTER, Clerk Supreme Court.

Judges of the Circuit Courts.

DURING THE TIME OF THESE REPORTS.

DURING THE TIME OF THESE REPORTS.

FIRST CIRCUIT—	HON. W. J. J. KELLY.‡
	HON. W. W. VANNESS.**
SECOND CIRCUIT—	HON. P. W. WHITE.
THIRD CIRCUIT—	HON. WILLIAM BRYSON.
FOURTH CIRCUIT—	HON. ROB'T B. ARCHIBALD.§
FIFTH CIRCUIT—	HON. J. H. GOSS.
SIXTH CIRCUIT—	HON. JAMES T. MAGBEE.
SEVENTH CIRCUIT—	HON. J. W. PRICE.

*Appointed January 16, 1873, vice Hon. O. B. Hart, elected Governor of the State. †Appointed May 20, 1874, vice Frazer, resigned. ‡Ad Interim appointment, April 23, 1873. **Ad Interim appointment, April 30, 1874. §Appointed January 27, 1873.

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MEMORANDA.

DEATH OF Hon. S. J. DOUGLAS.

SUPREME COURT STATE OF FLORIDA,
TALLAHASSEE, January 14th, A. D. 1874.

WEDNESDAY, 12 O'CLOCK, M.

Court met pursuant to adjournment.

Present—Honorable Edwin M. Randall, Chief Justice, James D. Westcott, Jr., Associate Justice, and Franklin Fraser, Associate Justice.

On the opening of the Court, M. P. Papy, Esq., addressed the Court announcing the death of the Honorable SAMUEL J. DOUGLAS, late one of the Justices of this Court, and read the proceedings and resolutions adopted at a meeting of the members of the Bar at the Court House in Tallahassee, and on motion of Mr. Papy, it was ordered that the said proceedings and resolutions be spread upon the records of this Court.

IN MEMORIAM.

Death having again invaded our circle and stricken down the Honorable SAMUEL J. DOUGLAS, a distinguished member of this bar, we are again arrested amid the scenes of professional conflict to contemplate the ways of God to man. The impressive lesson of the uncertainty of life, and that all of us must sooner or later yield to the demands of the inexorable law, is now again presented for our instruction. Shall we profit by it, or shall it, after the sod shall have covered all that remains of our lamented brother, pass away without leaving a trace of the impressions it cannot fail to have produced?

The deceased was a native of Virginia, at the University of which State he graduated with distinguished honor. In early manhood he was appointed by President Tyler Judge of the Superior Court of the Middle District of the Territory of Florida. The duties of his judicial station were discharged with an assiduity, impartiality and ability rarely surpassed. The labor required by an accumulation of business never equalled in this State called into exercise all his physical and mental powers, and unstintedly did he devote them to the performance of his duties. Thoroughly grounded in the principles of law, he was enabled to hold in equal balance the scales of justice amid the conflicts of an able bar. His office ended with the cessation of the Territorial form of government and the admission of Florida as a State into the Federal Union. He came to the bar with the enlarged experience his judicial career had enabled him to acquire. He was not long after appointed by President Taylor Collector of the Customs at Key West, the duties of which office he discharged

without a single reproach upon his official character. Devoted to the Union, he remained steadfast in his loyalty until Virginia, the mother he adored, withdrew from her Federal association, when he felt his fealty to her required his aid in the struggle that was impending. He accordingly returned to his native State and espoused the cause she had adopted. After the close of the war he returned to Florida, and was soon after appointed by Governor D. S. Walker an Associate Justice of the Supreme Court of this State. In this position he illustrated his judicial career by the ability and impartiality which distinguished his judgments and the opinions he pronounced. The reconstruction of the State government retired him from the bench, and he again returned to the bar, at which he remained until the day of his death, and at which he exhibited the noble elements of character which have ever distinguished the profession, and pursued that honorable conduct which is the only direct pathway to professional honors and success.

The members of the bar record with satisfaction, in the solemnity of the occasion, that no stain of dishonor rests on his professional or private character, and point to his career as a fit example for the imitation of those who are to follow the honorable profession he adorned by his life and conduct.

Resolved, That in the death of the Hon. SAMUEL J. DOUGLAS, which occurred on Friday, the 14th inst., the bar of this State has lost one of its most distinguished ornaments, and the community one of the most law abiding and useful citizens, and that we deeply deplore it as an especial loss to us as members of the bar of this city.

Resolved, That in commemoration of the expression of our sorrow, occasioned by this sad event, the Circuit Court now sitting in this city be requested to enter at large upon its minutes this testimonial of our affectionate regard for our deceased brother, and as a further token of respect for his memory, the Court be requested to adjourn for the day.

On motion of Mr. Hilton, it was ordered that a copy of these proceedings be furnished to the family of the deceased and to the newspapers of the city for publication.

DEATH OF Hon. O. B. HART.

SUPREME COURT STATE OF FLORIDA,
TALLAHASSEE, April 15, A. D. 1874.

WEDNESDAY, 10 O'CLOCK, A. M.

Court met pursuant to adjournment.

Present—Honorable Edwin M. Randall, Chief Justice, James D. Westcott, Jr., Associate Justice, and Franklin Fraser, Associate Justice.

Ordered, That the Clerk of this Court do spread upon the minutes thereof, in accordance with the motion of M. D. Papy, Esq., the proceedings and resolutions of a meeting of the members of the Bar, held in the Supreme Court Room at the Capitol at Tallahassee, on the 15th day of April, 1874, with respect to the decease of the late Governor, Ossian B. Hart, viz:

MEETING OF MEMBERS OF THE BAR.

At a meeting of the members of the Bar held in the Supreme Court Room at the Capitol, in the city of Tallahassee, on Wednesday the 15th day of April, A. D. 1874, to express their sentiments in regard to the death of the late Governor, OSSIAN B. HART, formerly an Associate Justice of the Supreme Court, on motion of M. D. Papy, Esq., the Honorable Edwin M. Randall, Chief Justice of the Supreme Court, was requested to act as Chairman and L. B. Foster, the Clerk of the Court, was requested to act as Secretary.

On motion, a committee of three was appointed, consisting of M. D. Papy, Esq., R. B. Hilton, Esq., and John Friend, Esq., to prepare suitable resolutions in memory of the late Governor, O. B. HART.

The committee, through M. D. Papy, Esq., presented the following Resolutions, which were adopted, viz:

IN MEMORIAM.

Whereas, in the Providence of God the Honorable O. B. HART has been removed from the labors of earth under circumstances peculiarly afflictive to the people of this State. Though in feeble health he was almost without warning suddenly stricken by the hand of death, and before assistance could be procured his spirit passed from its tenement of clay.

Governor HART was born in 1821, and has always resided in Florida. In early manhood he gave evidence of capacity for public usefulness, and in the various positions of public trust in which he was placed, he displayed his devotion to duty, and the same integrity of purpose and character that ever inspired the confidence of his fellow-men.

On the reorganization of the State government in 1868, he was appointed an Associate Justice of the Supreme Court of Florida, in which position he was called upon to engage in the decision and determination of some of the most delicate and important political as well as legal ques-

tions that were ever presented to any Court in this State, and in all of which he sought to hold the scale of justice with an even hand and to administer it impartially to all alike, whether of high or low degree. The qualities which secured for him the confidence of his fellow-citizens as a Judge, pointed him out as a fit person to occupy the Executive chair, and he was at the next election after his accession to the bench translated to the Executive Department and made Governor of the State. But he was not permitted to serve the full measure of his term. Whilst still, though in enfeebled health, giving his thoughts and his labors to his State, he was stricken down by the fell destroyer of all that is mortal.

The members of the Bar feel that they should as a class be permitted to add their tribute to his memory;

Therefore, Resolved, That in the death of Governor HART the people of this State have lost an honest and faithful public officer; one whose purposes and aims were directed to the promotion of their best interests and to the supremacy of the Constitution and laws.

Resolved, That though he had been removed from the bench and from direct association with the bar, we feel it due to his character as a lawyer and a judge to bear testimony to the uprightness, integrity, ability and faithfulness which illustrated his professional and judicial career.

Resolved, That as a token of respect for his memory, the Supreme Court now in session be requested to order this testimonial to be spread upon the minutes of the Court, and that the Court be requested to adjourn for the day. That a committee be appointed to present these Preamble and Resolutions to the Supreme Court, and that the Secretary of this meeting furnish a copy for publication, and also that he forward a copy to the family of deceased.

The meeting was addressed by Messrs. Papy and Hilton. On motion, the meeting then adjourned. EDWIN M. RANDALL, *Chairman.*

L. B. FOSTER, *Secretary*

RULES OF PRACTICE

ADOPTED BY THE

SUPREME COURT

OF THE

STATE OF FLORIDA,

FOR THE GOVERNMENT OF

THE SUPREME COURT, THE CIRCUIT COURT IN COMMON LAW ACTIONS AND CHANCERY CAUSES, AND THE COUNTY COURTS,

OF THE

STATE OF FLORIDA.

PUBLISHED BY ORDER OF THE SUPREME COURT.

TALLAHASSEE:
PRINTED AT THE OFFICE OF THE FLORIDIAN.
1873.

RULES OF PRACTICE

FOR THE GOVERNMENT OF

The Supreme Court of Florida.

Admission of attorneys.

Rule 1. It shall be required of an applicant for admission as an attorney and counsellor of this court, that he shall produce evidence of having been admitted to practice in some court of record in this State, or of some other State, or of the United States, and that he sustain a fair private and professional character, and that he take the following oath in open court: "I do solemnly swear that I will demean myself uprightly and according to law, and that I will support, maintain, and defend the Constitution of the United States, and of the State of Florida."

Motions to be docketed.

2. All motions made or submitted to the court, relating to causes before the court, shall be entered on the motion docket, and the affidavits or papers upon which the same are based shall be filed at least one day before the hearing thereof. The court will, when deemed necessary, require notice of a motion to be given to the parties or their attorneys.

Motions, when heard.

3. Motions will be heard immediately after the orders of the preceding day are read and opinions delivered, on each day during the term, and before taking up the docket, unless, in cases of necessity, or relating to a cause when called in its order, the court shall otherwise direct.

Dockets.

4. The clerk shall, before the commencement of each term, prepare a docket of all causes pending in this court, to be numbered and entered in the order of the time of filing the papers relating thereto, and a copy thereof shall be furnished to each of the justices, and a copy for the use of members of the bar.

Bonds upon appeals and in writs of error. Evidence of sufficiency of sureties.

5. Bonds accompanying petitions of appellants to this court or any justice thereof, praying an order that appeals in chancery from final decrees, either for a sum of money, or directing its payment, may operate as a supersedeas, will not be approved, nor will an order directing the appeal to operate as a supersedeas be made by any justice of this court, unless the securities in the bond be certified to be sufficient by a Judge of the Circuit Court, or satisfactory evidence accompanies the petition that the sure-

ties to the bond are worth in the aggregate a sum sufficient to cover the amount for which the decree has been rendered, together with costs, over and above all their liabilities, and the exemptions allowed by the Constitution. In appeals from an interlocutory order or a final decree, where it is not for a sum of money or its payment, the bond must be conditioned according to the circumstances of the case. Upon the penalty of the bond being fixed, the same evidence of the sufficiency of the securities will be required before an order directing the appeal to operate as a supersedeas will be made by any justice of this court. Whenever bonds are required to be approved by the Supreme Court or a justice thereof, the like evidence of the sufficiency of the sureties shall be required as is prescribed in the above rules.

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6. No cause shall be heard until a complete record, containing, without reference *aliunde*, all the papers, exhibits, depositions, and other proceedings which are necessary to the hearing in this court, shall be filed.

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7. If the return to a writ of error or upon an appeal shall be defective, either party may, upon affidavit specifying the defect, apply to one of the justices of this court in vacation for an order that the necessary correction be made without delay, and the justice may make such order, and the court may enforce obedience thereto. Upon a suggestion of diminution of the record, the court may award a *certiorari* directing the court below to make a further return, or supply the necessary paper or record; or may make an order directing the necessary return to be made, or the paper or record to be supplied. The affidavit upon which the motion therefor is based, must set forth the substance of the paper or record required to be returned, so that it can be particularly specified in the *certiorari* or order, and also that the same was at the time of the trial or hearing, and still remains, on file or of record in the court below, and that the affiant was not aware, and could not, in the exercise of due diligence, have informed himself of the defect in the record, so as to have had it made complete before the filing thereof in this court, and that the application is not made for delay. Every such motion must be made at the first term after the docketing of the cause, or special cause shown for the delay.

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8. The plaintiff in error or appellant shall file in the Supreme Court his assignment of errors (or petition of appeal, as the case may be) within three days after the return of the writ, or filing the transcript of the record on appeal; and if this be omitted, except for good cause shown, the writ of error or appeal shall, on motion of the defendant in error or appellee, be *non prossed* or dismissed, unless the court shall allow further time. (Thompson's Digest, 449, Sec. 2.) The argument of the cause shall be confined to the points made in the assignment of errors or petition of appeal.

Original papers.

9. Whenever the circuit judge shall deem it necessary or proper that an original paper or record shall be inspected by the Supreme Court, he may order the same to be transmitted in such manner as shall seem proper, and this court will in that case consider such original in connection with the transcript of the proceedings.

No record to be taken from the custody of clerk.

10. No record shall be suffered by the clerk to be taken away from his office or the court-room, except by the justices of the court, or upon the order of the court.

Party failing to appear.

11. In every cause in which either party shall fail to appear when the same is called in its order upon the docket, the adverse party may proceed *ex parte*.

Dismissal for failure to prosecute.

12. When a cause is called for argument at three successive terms, and at the third term neither party is prepared to argue or submit it, it shall be dismissed at the cost of the plaintiff in error or appellant, unless cause be shown for further postponement; but such dismissal shall be without prejudice to a motion at the same or the ensuing term, in an extreme case, to reinstate the case upon terms to be prescribed.

Attorney and guardian *ad litem*.

13. The attorneys and guardians *ad litem* in the court below shall be deemed the attorneys or guardians *ad litem* of the same parties in this court, unless others are duly appointed, and notice thereof given to the adverse party.

State cases preferred.

14. Causes in which the State is a party (including criminal cases) may be moved in behalf of the State out of their regular order on the docket at any time, except while a cause is being argued.

No cause to be heard until abstract and points furnished.

15. No cause standing for argument shall be heard by the court until the parties shall have furnished each member of the court with a brief abstract of the cause pending, containing the substance of all the material pleadings, facts, and documents on which the parties rely, and the points of law and fact intended to be presented in the argument, with a reference to the authorities they intend to cite. If the case is voluminous an index to the pleadings, exhibits, depositions, and testimony shall be furnished. In cases where it may be necessary for the court to go into an extended examination of evidence, each party shall briefly state the leading facts which he deems established, with a reference to the pages of the record where the evidence of such facts may be found. The court will not hear an extended discussion upon any mere question of fact.

Copy of record may be had, &c.

16. In all cases brought to this court by appeal or otherwise, either party may apply for and receive from the clerk of this court a copy of the record, the cost of which shall abide the event of the suit, and be taxed as other costs in the cause.

Dismissal for failure to file record.

17. In case the plaintiff in error or appellant shall fail to file with the clerk of this court a true copy of the record and proceedings as required by law, (Thompson's Digest, 448, Sec. 1,) the defendant in error or appellee may procure and file such copy,

and thereupon the cause may proceed in like manner as if the same had been filed by the plaintiff in error or appellant; and no motion to dismiss at the first term after the appeal or writ of error, on account of the neglect of the plaintiff in error or appellant to file a certified copy of the record and proceedings, will be heard unless notice of such motion shall have been served on the opposite party, or his attorney or solicitor.

18. When any cause shall be dismissed in this court, judgment for costs shall be entered against the plaintiff in error or appellant. When a judgment, decree, or order, shall be affirmed or reversed, the prevailing party shall recover costs against the other. When there shall be an affirmance in part and a reversal in part, the costs shall be awarded in the discretion of the court against either or both parties. When costs are allowed the amount thereof shall be entered in the body of the judgment or order.

19. In case of dismissal of any suit, or the affirmance or reversal of any judgment, decree, or order, it shall be the duty of the clerk to transmit to the court below a certified copy of the judgment, decree, or order of this court, together with such original papers as may have been transmitted from that court, and to issue such process as may be directed by this court or required by law or the rules of this court; but no copy of the judgment or decree, nor any such process or mandate, shall be issued until the final adjournment, unless by special order of this court.

20. Service of all papers and notices required by these rules, or by the order of this court, may be made by delivering a copy of the paper or notice to the party to be served, (or to his attorney or solicitor, if he have one,) or in his absence by leaving the same in his office during the usual office hours; or by leaving the same at his dwelling-house with some member of the family in which he resides of the age of fifteen years; or by depositing in the post-office directed to such party or attorney at his place of residence, securely sealed and postpaid. When service is by mail double time shall be allowed.

21. The clerk may exact security in advance for the payment of his fees, which security may be by a bond or recognizance, (to be approved by him or by a circuit judge, or a justice of this court,) or a deposit of $15 before docketing a cause. Execution may be issued against the party giving security and the sureties, if his fees shall not be paid within twenty days after taxation thereof, by a justice of this court and service of a copy of the taxed bill on the party liable or his attorney. The clerk may refuse to issue a copy of the final judgment, decree, order, or mandate until his fees are paid, unless the court shall otherwise order.

22. In all cases of equity jurisdiction no objection shall be allowed to be taken to the admissibility of any deposition, deed,

or other exhibit found in the record as evidence, unless objection was taken thereto in the court below and entered in the record or endorsed thereon; and when any such paper is found copied into the record by the clerk, this court will presume that the same was offered in evidence or used in the court below.

Order of argument.

23. Causes may be submitted upon written or printed arguments or briefs at any time during the term, which arguments or briefs must be signed or endorsed by counsel. The plaintiff in error or appellant may open and conclude the argument. Not more than two counsel shall be permitted to argue a cause on either side, unless by special permission of the court.

Rehearings.

24. Rehearings must be applied for by petition in writing during the term at which the judgment is entered, and the attention of the court called thereto, unless further time is allowed by the court. The petition shall not assume any new ground or position not taken upon the argument or in the points made upon which the cause was submitted, but must set forth concisely the particular omission or cause for which the judgment is supposed to be erroneous. The court will consider the petition without argument. A petition for a rehearing is not a part of the record, unless so ordered or rehearing granted.

Proceedings case of death of party after appeal, &c.

25. Whenever, pending a writ of error or appeal in this court, either party shall die, the proper representatives of the personalty or realty of the deceased party, according to the nature of the case, may voluntarily come in and be admitted parties to the suit, and thereupon the cause shall be heard and determined as in other cases; and if such representatives shall not voluntarily become parties, then the other party may suggest the death on the record, and thereupon, on motion, obtain an order that unless such representatives shall become parties within the first three days of the ensuing term, the party moving for such order shall (if defendant in error or appellee) be permitted to have the writ of error or appeal dismissed; and if the party so moving be plaintiff in error or appellant, he shall be entitled to open the record and, on hearing, have the judgment or decree reversed if erroneous; *Provided*, That a copy of such order shall be published in some newspaper at the seat of government for three successive weeks, beginning at least sixty days before the first day of the term of the Supreme Court at which the hearing shall be had.

RULES OF PRACTICE

FOR THE GOVERNMENT OF

THE CIRCUIT COURTS

IN COMMON LAW ACTIONS.

I. Officers of Courts.

Admission to the bar, how applied for.

Examination, how had.

Form of license to practice.

Rule 1. Persons making application for admission to the bar, shall apply by petition to one of the Judges of the Circuit Court; he shall present satisfactory evidence that he is twenty-one years of age and of good moral character, whereupon the judge shall examine into the qualifications of the applicant, and if found qualified he shall grant him a license to practice in the several courts of this State, which license shall be entered upon the minutes of the court.

When examination may be by members of the bar.

Their oath.

2. If from any cause it shall be inconvenient for the judge personally to examine into the qualifications of the applicant, he may require the examination to be made by two members of the bar, who shall be previously sworn faithfully to examine and report as to the qualifications of the person seeking admission.

Form of oath to be taken upon admission.

Form of license.

3. Upon the applicant being found duly qualified, the following oath shall be administered to him: "You do swear (or affirm) that you are duly qualified, according to the Constitution and laws of this State, to exercise the office of counsellor and attorney at law and solicitor, and will to the best of your abilities discharge the duties thereof, and truly and honestly demean yourself in your profession, and support, protect, and defend the Constitution of this State and of the United States." Whereupon a license shall be given to him by the judge. This license shall authorize him to practice in the several courts of this State, and it shall be entered upon the minutes of the court.

Attorneys of courts of the U. States and other States, how admitted.

4. Attorneys at law who have been admitted to practice in any court of record in any State of the Union, or in any United States court, shall be admitted to practice in any of the courts

of this State, on producing evidence of having been so admitted, and upon taking the oath above mentioned.

Attorney shall not be taken as bail or as security.

5. No attorney or other officer of court shall enter himself or be taken as bail in any criminal case, or as security in attachment, appeal, or writ of error, or other proceedings in court, on pain of being considered in contempt, and of having the proceeding dismissed on account thereof.

Upon demand shall declare whether writ was issued by him, and upon order shall state the residence of the plaintiff.

6. Every attorney whose name shall be entered on any writ of summons shall, on demand in writing, made by or on behalf of any defendant, declare forthwith whether such writ was issued by him or with his authority or privity; and if he shall answer in the affirmative then he shall also, in case a judge shall so order and direct, declare in writing, within a time to be allowed by such judge, the place of residence of the plaintiff, on pain of being guilty of contempt of the court from which such writ shall appear to have been issued; and if he shall answer in the negative, all proceedings upon the same shall be dismissed.

II. Conduct of Suits.

Præcipe in personal actions and actions for the recovery of real or personal property.

7. All actions shall be commenced by filing a praecipe with the clerk of the court. The praecipe for process in personal actions, or in actions other than for the recovery of specific real or personal property, shall contain the title of the case, the description of the court in which the action is brought, the amount of the debt or damages for which plaintiff sues, the day to which the process is returnable, and shall be signed by the plaintiff or his attorney. It shall not be necessary to state therein the form of action. In actions brought for the recovery of specific real or personal property, or actions of like character, the praecipe shall be framed in accordance with the particular character of the action and the rights of the parties.

Process. Style of. When issued.

When returnable.

Service, and return of.

Alias and pluries, how issued, served and returned.

8. The style of all process shall be, "The State of Florida," shall bear teste in the name of the clerk issuing it, be signed by him, and bear date when issued, and when not otherwise provided specially by these rules or by law, shall be made returnable to the next rule day thereafter, unless there shall not be ten days intervening between the day of the issuing of the same and the next rule day, in which case the process shall be made returnable to the rule day in the next succeeding month. The service of process shall be made at least ten days before the rule day to which it is returnable. If from any cause the sheriff or other officer shall fail to execute the process, he shall return the same not served, with the reasons for such failure, to the rule day to which it is returnable; whereupon the clerk shall, unless otherwise directed by the plaintiff or his attorney, issue an *alias* or *pluries* summons, as the case may require, which shall be returnable and served as the original process is required to be. If, in the judgment of the plaintiff's attorney,

the service is defective or irregular, he may direct an *alias* or *pluries* summons to be issued by the clerk, returnable according to law.

Proceedings when writ against two is returned served as to one and that the other does not reside in the county.

9. When an original writ or summons has been sued out against two or more defendants, and returned by the sheriff or other officer served upon one or more of the defendants, and that the other defendants do not reside in said county, it shall be lawful for the plaintiff, at his option, to proceed to judgment as authorized by law, against those upon whom process has been served, or to order additional writs or process to be issued by the clerk, to be directed to the sheriffs of the counties in which the other defendant or defendants reside, to be served and returned as directed by law in other cases of writs or process.

Amendment of writ.

10. In case amendments of the writ in any action are made under Sec. 2, Chapter 1096, Laws of Florida, notice that such amendment is made shall be given to the defendant, and the defendant, notwithstanding such amendment, shall not in such case have any further time for pleading or entering his appearance in the action. All amendments authorized by this section may be made in vacation as well as in term.

Writs of scire facias, how issued, served and returned.

11. All writs of *scire facias* which may be issued as authorized by law, shall be returnable and served as other writs and summons issued on the institution of an action, and the same rules in regard to the time of appearance and pleading shall apply thereto as in other cases.

III. Motions.

Amendment of pleadings, when and how had.

12. Motions may be made and granted for the amendment of any pleading at any time in vacation upon such terms as the judge may direct, provided notice of such motion be given to the adverse party to show cause, if any he can, why the same should not be granted; (Sec. 74, Chap. 1096, Laws of Florida,) *And provided also*, That nothing herein shall prevent either party from amending his pleading as of course before there shall have been any plea or reply filed to the pleading proposed to be amended.

IV. Declarations.

Declaration.

13. All declarations shall be filed on or before the rule day to which the process is made returnable. If not thus filed no default for want of appearance shall be entered. If the declaration is not filed on the next succeeding rule day thereafter the case shall stand dismissed at the cost of plaintiff, and the clerk shall enter an order accordingly. If it is filed upon or before that day, the defendant shall be held to enter his appearance upon

that day, and the cause shall proceed in all respects as if that had been the original day for the return of the process.

Copy of cause of action, when to be filed.

14. All bonds, notes, bills of exchange, covenants, contracts, and accounts upon which suit may be brought, or a copy thereof, shall be filed with the declaration, (unless the writ has been specially endorsed under the provisions of Sec. 3, Chap. 1096, Laws of Florida,) and in default thereof the defendant shall not be bound to plead to the declaration until a copy of the cause of action has been served upon him, in which event he shall be held to file his plea at the next rule day thereafter. If such copy of the cause of action is not served ten days before the rule day succeeding the filing of the declaration, (except in the cases provided for in sec. 3, chap. 1096, as aforesaid,) the cause shall stand dismissed upon that rule day, and the clerk shall enter an order accordingly.

If not filed, suit shall be dismissed.

V. Pleas and Subsequent Pleadings.

Plea.

15. All pleas shall be sworn to by the defendant, his agent, or attorney, and shall be filed at the rule day next succeeding the rule day at which his appearance is required to be entered, or the rule day next after that upon which the declaration is required to be filed.

Pleadings may be filed at any time before default is entered.

16. If, upon the return day of the summons, the defendant shall fail to appear, and if no default shall on account thereof be entered or be caused to be entered by the plaintiff, the defendant may at any time before the next rule day appear and file his pleas or demurrer in the same manner as if he had appeared on the return day of the summons; and in like manner if no default shall be taken or entered, in conformity to the rules, for failure to file any plea, subsequent pleading, or demurrer by the defendant, the defendant shall be at liberty to file his plea, demurrer, or other pleading at any time until such default shall have been taken for want of plea or demurrer or subsequent pleading as aforesaid.

Dilatory pleas and pleas denying signature.

17. There being no distinction between appearance and trial terms, pleas in abatement or other dilatory pleas or any plea denying the signature of any defendant to any bond, note, or other instrument of writing, shall be filed within the same time as other pleas, are required to be filed by law, and be subject to the like rules in regard thereto.

Plea in abatement for non-joinder of defendant.

18. No plea in abatement for the non-joinder of any person as a defendant shall be allowed, unless it shall be stated in such plea that such person is resident within the jurisdiction of the court, and unless the place of residence of such person, if known, shall be stated with convenient certainty in an affidavit verifying the same.

Plea in abatement for misnomer.

19. No plea in abatement for a misnomer shall be allowed in any personal action, but in such case the defendant shall be at

liberty to require the declaration to be amended at the cost of the plaintiff by inserting the right name upon an order of the court or judge, founded on an affidavit showing the right name; and in case such application shall be discharged the costs of the same shall be paid by the party applying. The plaintiff in all such cases of misnomer, where the true defendant has been served, or has appealed, shall have the right to amend his declaration and writ by inserting the right name, without the order of the court or judge.

Amendment when the true defendant is served.

Replication, rejoinder and other subsequent pleadings.

20. If the plea or any subsequent pleading require a replication, rejoinder, or other answer, the replication shall be filed within twenty days after the filing of the plea, and the rejoinder or other answer shall be filed within twenty days after notice of the filing of the replication or other subsequent pleading requiring an answer; but if any regular or special term of the court shall be held in the county where the suit is pending by the next rule day after the filing of the plea, all issues shall be made up by or during the said term, and by the time the cases are called for trial, unless further time is allowed by the court for good cause shown.

Issues and trial.

When no rule fixing time of pleading, Judge may do so.

21. In all cases in which the regular order of pleading is varied or interrupted by the action of the court or judge in striking out any pleading, (Chap. 1096, Sec. 16, Laws of Florida,) or in any other manner, and the time for pleading, and subsequent course of proceeding in such case, is not provided for under the rules or by law, the judge or court shall fix the time of pleading in his discretion, conforming as near as may be to the general rules as to time of pleading. Defaults for want thereof, and judgments consequent thereon, may be entered by the clerk as in other cases.

Protestation.

22. No protestation shall hereafter be necessary in any pleading.

Pleadings unless otherwise expressed, to be taken in bar of the whole action.

23. All pleas, replications, and subsequent pleadings pleaded without the formal parts of *actionem non* or *precludi non*, or the like effect,or any prayer of judgment,shall be taken, unless otherwise expressed, as pleaded respectively in bar of the whole action, or in maintenance of the whole action.

Averments of partnership admitted unless denied.

24. Whenever, in any action, the plaintiffs or defendants in their pleadings shall allege that the plaintiffs or defendants were partners, or that either of the parties and any third person were partners, or that as such partners they used any particular partnership name or style, such averments shall be taken to be true unless expressly denied by the opposing party or by some one in his behalf.

VI. Demurrers.

Demurrer, when to be filed.

25. Demurrers to declaration or other pleadings shall be filed within the same time as is prescribed with respect to pleas or other subsequent pleadings.

To be verified by party and certificate required of counsel.

26. No demurrer shall be filed unless it is verified by the oath of the party, his agent, or attorney that it is not interposed for the purpose of delay, and unless it is also accompanied with a certificate of the counsel or attorney that he believes it to be well founded in law.

Joinder in demurrer.

27. A joinder in demurrer shall be filed within four days after notice of the filing of the demurrer. That a joinder in demurrer has not been filed by the opposite party not be a cause for the postponement of the hearing of the demurrer, but the court, if the party is present, may require him to file his joinder in demurrer instanter, and if he is in default in not appearing at the time fixed for the argument of the demurrer, the court may proceed to hear the same without such joinder, or such joinder may be added by the opposite party.

When may be heard, and how brought to hearing.

28. Demurrers may be heard and determined in vacation, upon five days' notice, given by either party, of the time and place at which the same are to be argued. After notice having ben given of the time when a motion to dispose of a demurrer will be made, it shall be the duty of the clerk, at the request of the party giving the notice, to transmit the papers in the cause under seal to the judge of the court, to be used upon the hearing.

Judgment upon demurrer and pleading thereafter.

29. The court or judge, upon disposing of any demurrer, otherwise than by final judgment, may make an order fixing the time in which an amendment of the pleading demurred to may be made, and the time in which the next and subsequent pleadings to be amended pleading in the cause shall be filed by the parties. In case of default in pleading to the amended or new pleading, in conformity to the order of the judge, the clerk shall enter the same; and shall, upon the next rule day thereafter, enter such judgment as would be consequent upon such default in pleading under the rules in other cases.

After demurrer, party may amend as of course.

Reply to amended pleading.

30. Upon demurrer to any declaration or other pleading, the party plaintiff or defendant may admit the cause of demurrer by filing an amended declaration or pleading, which shall do away with the cause of demurrer. In such case a copy of such amended declaration or pleading shall be served on the adverse party, who shall have until the next rule day to reply to the same, if ten or more days shall intervene, and if not, then until the next succeeding rule day.

VII. Entry of Defaults and Judgments upon Defaults.

ent efault.

31. Judgments final consequent upon the entry of defaults for want of an appearance, or for want of plea, may be entered on the same rule day that the defaults are entered, as well as upon any subsequent day as authorized by law, (Chap. 1938, Sec. 7, Laws,) but if at any time during the rule day on which the default is entered, the defendant shall enter his appearance or file his plea or answer, as the case may be, the entry of the default and of the final judgment thereon, if any has been made, shall be vacated, and the case shall proceed as if no default had been entered. In cases where the action is "upon an open account or other contract for the payment of money not in writing," no judgment upon defaults shall be entered by the clerk, until after filing of the proofs required by law, (Sec. 7, Chap. 1938, Laws of Florida,) all of which shall be in writing, and shall be filed with the papers in the case.

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32. Defaults in appearance and pleading may be entered upon rule days by the clerk in all cases, including those in which, by law, final judgments are authorized to be entered by the clerk, as well as those in which by law he is not authorized to enter final judgments. In all cases where, upon the calling of the dockets in term, such defaults upon the part of the defendant are found, the plaintiff shall be entitled to prove his case and take judgment according to law, unless for good cause shown the default is opened, in which event the plaintiff shall be entitled to have his case tried at that term, unless the court shall otherwise order for good and sufficient cause.

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33. In case a rule day shall occur during a term, like proceedings may be had in the matter of entering defaults, and judgments by defaults, in the clerk's office as upon other rule days. Where a rule day occurs in term, and such rule day is the day upon which the defendant is held to file his plea or demurrer to the declaration, any issue of fact arising upon such plea shall not be heard during that term, unless by consent of parties. If, however, a demurrer is interposed by either party in term, such demurrer may be heard and disposed of during the term, in the discretion of the court.

VIII. Executions.

ion.

34. It shall be the duty of the clerk to issue writs of *fieri facias*, or other proper writs of execution, upon all judgments rendered at rules, at any time ten days after the entry of the judgment, and not before, unless by special order of the judge he is so directed.

IX. Revival of Suits upon the Death of Parties.

35. In case of the death of a sole plaintiff, his or her legal representative may at any time, upon filing a certified copy of his or her letters testamentary or of administration, obtain an order of the judge in vacation, or of the court in term, directing a suggestion of the death of the plaintiff, and that he is such legal representative, to be entered by the clerk at the next rule day if in vacation, or forthwith if in term, and the action shall thereupon proceed in the name of such representative. Notice of the entry of such suggestion shall be given to the defendant by the plaintiff or his attorney, and the defendant shall have the right, at any time within twenty days of the service of such notice, to deny upon oath the truth of such suggestion, or the fact that the person is such legal representative. In case of such denial the issue thereupon made shall be determined at the trial, with the other issues, if any, in the case. If no such denial is filed within the time aforesaid, the representative character of the new plaintiff shall be deemed to be admitted. Upon the revival of the suit by the entry of the suggestion of the death of plaintiff as aforesaid, the case shall, for the purpose of the pleadings therein, be considered in the same condition as on the rule day at which the last pleading therein was filed.

Revival upon death of plaintiff.

Pleadings in such case.

36. In case of the death of a sole defendant, or sole surviving defendant where the action survives, the plaintiff may at any time make a suggestion in the clerk's office of the death of such defendant, and may at the same time, or any other time, also suggest that a person named by him is the executor or administrator of the deceased, whereupon the clerk shall issue a notice to such executor or administrator, accompanied by a copy of the writ and suggestion, requiring him to appear at the next rule day thereafter, and that in default of his so doing the plaintiff may take judgment against him as such executor or administrator. At such rule day an order shall be entered making him a party, and the same proceedings may be had and taken in case of non-appearance, after such notice, as if the action had been originally brought against such execution or administrator in respect of the cause for which the action was brought. The new defendant may be permitted to plead such pleas as the original defendant might have done, and also such pleas as may be appropriate and rendered necessary by his character as executor or administrator, and in case the plaintiff shall recover he shall be entitled to like judgment as in an action originally commenced against the executor or administrator; *Provided*, That the time of service of such notice before the next rule day, and the time to appear and to plead after service of the same, shall be the same as is provided for in case of service of summons in the original institution of an action, and the service of

Revival upon death of defendant.

Pleadings in such case.

such notice shall be by the proper officer as in case of the service of writs.

X. Misjoinder and Non-joinder of Parties.

Non-joinder of plaintiff. Amendment after plea in abatement for.

Plea of defendant consequent thereon.

37. Whenever the plaintiff shall amend the writ, after notice by the defendant, or a plea in abatement for a non-joinder under section 7, chapter 1096, laws of Florida, he shall file a consent in writing of the party or parties whose name or names are to be added, together with an affidavit of the handwriting, and give notice thereof to the defendant, and the pleading *de novo* authorized by said section shall be filed by the next rule day thereafter, if fifteen days shall intervene between such notice and such rule day, and if not, then by the next succeeding rule day.

Orders striking out adding plaintiffs, or striking out or defendants, how made.

Pleadings thereafter.

38. The orders authorized to be made for non-joinder or misjoinder of plaintiffs by section 5, chapter 1096, laws of Florida, and for misjoinder of defendants authorized by section 8 of the same chapter, may be made by the judge in vacation upon notice to the defendant as well as in term, and the judge or court in granting the same may, in addition to such terms as he may impose as to the amendment of the pleadings, also prescribe the time for the filing of any pleadings, if any pleadings are necessary to bring the cause to issue.

Service of amended writ in case of a plea in abatement for non-joinder of persons as defendant.

Pleadings thereafter.

39. The service of the amended writ, under Sec. 9, Chap. 1096, Laws of Florida, shall be the same as in original actions, and the new defendant shall be bound to enter his appearance at the next rule day, if ten days have elapsed from the service of the amended writ, and if not then, at the next succeeding rule day, and to file his plea on the rule day next after entering his appearance; and the original defendant shall be held to file his plea or other pleading, as the case may be, on the rule day succeeding that to which the amended writ is made returnable.

XI. General Rules.

General Common Docket.

40. The clerk shall keep a general docket for common law cases, in which all causes shall be entered upon the filing of the praecipe and the issuing of the summons. This docket shall contain memorandum entries, to be made by him, showing the progress of the cause.

Bench and Bar Docket in term.

41. Before each term he shall prepare a bench docket and a bar docket, containing all common law cases not finally disposed of at rules; all cases of claim, illegality in process, attachments, garnishments, appeals, *certioraris*, and all other cases or matters to be heard at such term, including criminal causes undisposed of. In this docket he shall enter all cases in equity, in accordance with the first rule of equity practice. This general docket shall be divided and arranged as the judge may

direct. The clerk shall also keep a separate motion docket, upon which shall be entered by the attorneys all motions which are intended to be submitted to the court. Motion Docket.

42. He shall also keep a judgment and execution docket. In this docket he shall enter the names of the parties, (placing the names of parties against whom judgments are rendered in alphabetical order,) the character of the action, the date of the judgment, the amount of the judgment, specifying the debt, or damages, and costs, the date the execution issued, and the date at which it is delivered to the sheriff. Under the head of "remarks" shall also be stated the proceedings had and the returns made thereon, and other matters of interest to the parties. The Judges of the Circuit Court may, in their discretion, direct separate judgment and execution dockets to be kept if they deem it desirable. Judgment and Execution Docket.

43. No private agreement or consent between parties or their attorneys, in respect to the proceedings in a cause shall be of any force before the court, unless the evidence thereof shall be in writing, subscribed by the party, or his attorney, against whom it is alleged. Agreements may be made in open court and noted by the judge in his minutes. Private agreements.

44. Objections to interrogatories, or to the form in which they are conceived, must be assigned in writing before the commission issues, or the deposition is taken, and in all cases where objections are so made, the party whose interrogatories are objected to may, if he desires, before the commission issues, have the judgment of the court or judge thereon, by giving notice to the adverse party that on a given day he will apply to the court or the judge, if in vacation, for his judgment upon the validity of the objections made. Testimony upon commissions. Objections to interrogatories, when and how may be heard.

45. Objections to the execution of the commission for taking interrogatories or the manner in which depositions are taken shall be made and disposed of before the parties go to trial, if the deposition shall have been received before the commencement of the trial, and if for any cause the depositions or any answer to interrogatories are quashed or suppressed, the court if the justice of the case requires shall authorize the retaking of the deposition and allow time for that purpose. Objections to manner of taking depositions.

46. Depositions returned to the clerk's office may be opened at all times by consent of parties, or upon the order of the court or judge. When to be opened.

47. When documentary evidence is introduced in a cause, it shall be filed with the clerk, and considered in the custody of the court and not withdrawn except with leave. Documentary evidence, how withdrawn.

48. When a case is called in its order, the same must be tried, continued, or dismissed; but by consent, the cause may be placed at the foot of the docket, to be again called if there be time for the second calling of the docket. Trial of causes.

uance. 49. A party applying for a continuance shall state fully and clearly all the facts which he conceives may entitle him in law to such continuance, which shall be sworn to. In cases of application for a continuance, the party applying shall have his affidavit ready on the calling of the case.

tinu- 50. The plaintiff may at any time discontinue his cause in the clerk's office, by paying costs and entering a written discontinu-
office. ance thereof.

it. 51. The plaintiff shall in no case be compelled to submit to a nonsuit, but if he desire to do so it must be done before the jury retires.

uation esses. 52. Only one counsel on each side shall conduct the examination of witnesses, except by permission of the court.

s. 53. Motions required by law or by these rules shall be in writing, and due notice given to the opposite party.

sion in l case. 54. Where the rights of concluding a criminal case belongs to the State Attorney, he may delegate it to other counsel.

of law. 55. No wager of law shall be allowed.

ion of nts. 56. The form of notice to admit documents referred to in Sec. 41, Chap. 1096, of the Laws of Florida, may be as follows:

In the Circuit Court,
——— Judicial Circuit,
——— County.

A. B. }
vs.
C. D. }

f Take notice, that the Plaintiff [*or* Defendant, *as the case may be,*]
ng. in this causeproposes to adduce in evidencethe several documents hereunder specified, and that the same may be inspected by the Defendant [*or* Plaintiff,] his attorney or agent at———, on——, between the hours of ———; and the Defendant [*or* Plaintiff] is hereby required, within forty-eight hours of the last mentioned hour, to admit that such of the said documents as are specified to be originals were respectively written, signed, or executed,as they purport, respectively, to have been; that such as are specified as copies, are true copies; and such documents as are stated to have been served, sent, or delivered, were so served, sent or delivered, respectively, saving all just exceptions to the admissibility of all such documents as evidence in this cause.

Dated, &c.

G. H., Attorney or Agent,
For Plaintiff [*or* Defendant.]

To E. F., Attorney, (or Agent) for Plaintiff [*or* Defendant.]
(Here describe the documents, the manner of doing which may be as follows:)

ORIGINALS.

Description of Documents.	*Date.*
Indenture of lease from A B to C D.....	1st Jan'y, 1848
Indenture of release between A B,C D,1st part, &c	2d Feb'y, 1848

COPIES.

Description of Documents.	*Date.*	*Original or Duplicate served sent or delivered—when, how and by whom.*
Letter—plaintiff to defendant.....	Jan. 1, 1848	Sent by General Post February 2, 1848.
Notice to produce papers.....	Mch 1, 1848	Served Mch 2, 1848, on defendant's attorney by E. F. of—

57. In all actions bv and against executors or administrators, or persons authorized by statute to sue or be sued as nominal parties, the character in which the plaintiff or defendant is stated on the record to sue or be sued, shall not in any case be considered as in issue, unless specially denied.

Nominal parties, character of not in issue unless denied

58. The judge may, upon the application by petition of either party, order the discovery and production of books, papers or documents in the possession or under the control of the other party which may be necessary to enable the party making the application to frame his reply or answer to any pleading of his adversary. The petition for suchdiscovery shall statethe facts and circumstances on which the discovery is claimed, and shall be verified by affidavit stating that the books. papers or documents whereof discovery is sought, are under the control or in the possession of the other party, and that he is advised by his counsel and verily believes that the discovery of the books, papers or documents mentioned in such petition is necessary to enable him to draw, his answer or reply to his adversary's pleading. A copy of the petition shall be served upon the opposite party, and six day's notice of the time and place of application for the order shall be given. The order granting the discovery shall specify the mode in which the same is to be made, which may be either by requiring the party to deliver sworn copies of the documents to be discovered, or by requiring him to produce and deposit the same with the clerk of the court in which the trial is to be had. The order shall also specify the time within which the discovery or deposit is to be made. The order directing a discovery shall operate as a stay of all other proceedings of the adverse party in the cause until such order shall have been complied with or vacated, and the party

Discovery of books and papers.

Petition for, what shall contain.

Service of same.

Order granting discovery.

Shall be a supersedeas.

obtaining such order shall have, after such compliance or vacation, until the next rule day to prepare his pleading, provided ten days intervene before the next rule day, and if not, then he shall have until the next succeeding rule day.

Unnecessary counts may be stricken out.

Several pleas, when not allowed.

59. In case of several counts on the same cause of action, the court may strike out such counts as it deems unnecessary or improper. Several pleas, replications, or subsequent pleadings, or several avowries or cognizances founded on the same ground of answer or defense shall not be allowed, except in cases where it may appear to the court or judge to be proper for determining the real question in controversy between the parties on its merits. In case of the violation of this rule, the court or judge may order a reformation of the pleading on such terms as to costs and otherwise, as he may think fit.

Judgment to be given against parties upon such counts or pleas as they fail to establish.

Costs in such cases.

60. Upon the trial, where there is more than one count, plea, avowry, or cognizance, upon the record, and the party pleading fails to establish a distinct subject-matter of complaint in respect of each count, or some distinct ground of answer or defence in respect of each plea, avowry or cognizance, a verdict and judgment shall pass against him upon each count, plea, avowry, or cognizance, which he shall have so failed to establish, and he shall be liable to the other party for all the costs occasioned by such count, plea, avowry, or cognizance, including those of the evidence, as well as those of the pleading.

Costs upon counts and issues.

61. No costs shall be allowed on taxation to a plaintiff upon any counts or issues upon which he has not succeeded, and the costs of all issues found for the defendant shall be deducted from the plaintiff's costs.

Nol pros., costs upon.

62. When any *nolle prosequi* shall have been entered upon any count or as to part of any declaration, the defendant shall be entitled to and have judgment for, and recover his reasonable costs in that behalf.

Days. How reckoned.

What days excluded in reckoning.

63. In all cases in which any particular number of days, *not expressed* to be *clear days*, is prescribed by the rules or practice of the courts, the same shall be reckoned *exclusively* of the first day, and *inclusively* of the last day, unless the last day shall happen to fall on Sunday, (Christmas day, Good Friday, or a day appointed for a *public fast or thanksgiving*,) in which case the time shall be reckoned *exclusively* of that day also.

XII. Rules in Particular Actions.

Non assumpsit or plea traversing the contract in actions upon simple contract, effect of.

64. In all actions on simple contract, except as hereinafter excepted, the plea of *non assumpsit*, or a plea traversing the contract or agreement alleged in the declaration, shall operate only as a denial in fact of the express contract, promise or agreement alleged, or of the matters of fact from which the contract, promise or agreement alleged may be implied by law.

Exempli gratia: In an action on a warranty, such pleas will

operate as a denial of the fact of the sale and warranty having been given, but not of the breach; and in an action on a policy of insurance, of the subscription to the alleged policy by the defendant, but not of the interest, of the commencement of the risk of the loss, or of the alleged compliance with warranties.

Illustrations of the rule.

In actions against carriers and other bailees for not delivering or not keeping goods safe, or not returning them on request, and in actions against agents for not accounting, such pleas will operate as a denial of any express or implied contract to the effect alleged in the declaration, but not of the breach. The plea of "never was indebted" shall be applicable to the declarations embraced in forms from one to twelve inclusive, as prescribed in Section 75 of Chapter 1096 of the Laws of Florida, and to those of a like nature, embracing generally causes of action which constitute the foundation for an action of debt on simple contract, except bills of exchange and promissory notes. To such causes of action the plea of *non assumpsit* shall be inadmissible, and the plea of "never was indebted" will operate as a denial of those matters of fact from which the liability of the defendant arises.

"Never was indebted," plea of, to what actions applicable.

Non-assumpsit, plea of not applicable to such action.

Exempli gratia: In actions for goods bargained and sold, or sold and delivered, the plea will operate as a denial of the bargain and sale, or sale and delivery in point of fact; in the like action for money had and received, it will operate as a denial both of the receipt of money and the existence of those facts which make such receipt by the defendant a receipt to the use of the plaintiff.

"Never was indebted," Effect of such plea.

65. In all actions upon bills of exchange and promissory notes, the plea of "non assumpsit" and "never was indebted" shall be inadmissible. In such actions, therefore, a plea in denial must traverse some matter of fact.

Bills of exchange and promissory notes. Pleas in actions upon.

Exempli gratia: The drawing, or making, or indorsing, or accepting, or presenting, or notice of dishonor of the bill or note.

66. In every species of actions on contract, all matters in confession and avoidance, including not only those by way of discharge, but those which show the transaction to be either void or voidable in point of law, on the ground of fraud or otherwise, shall be specially pleaded.

All matters in confession and avoidance to be set up by special plea.

Exempli gratia: Infancy, coverture, release, payment, performance, illegality of consideration, either by statute or common law, drawing, indorsing, accepting, &c., bills or notes by way of accomodation, set off, mutual credit, unseaworthiness, misrepresentation, concealment, deviation, and various other defences, must be specially pleaded.

67. In actions on specialties and covenants, the plea of non est factum shall operate as a denial of the execution of the deed in point of fact only, and all other defences shall be specially pleaded, including matters which make the deed absolutely void, as well as those which make it voidable.

"Non est factum," effect of plea of.

68. The plea of *nil debit* shall not be allowed in any action.

"Nil debit," plea of, not allowed.

ent, how d.

69. Payment shall not in any case be allowed to be given in evidence in reduction of damages or debt, but shall be pleaded in bar.

detinet." of such

70. In actions for detaining property, the plea of *non detinet* shall operate as a denial of the detention of the property by the defendant, but not of the plaintiff's property therein, and no other defence than such denial shall be admissible under that plea. This rule does not apply to actions for the replevin of property under the statutes of this State.

guilty." of such actions ts.

71. In actions for *torts*, the plea of Not Guilty shall operate as a denial only of the breach of duty or wrongful act alleged to have been committed by defendant, and not of the facts stated in the inducement, and no other defence than such denial shall be admissible under that plea; all other pleas in denial shall take issue on some particular matter of fact alleged in the declaration.

Exempli gratia: In an action for a nuisance to the occupation of a house by carrying on an offensive trade, the plea of Not Guilty will operate as a denial only that the defendant carried on the alleged trade in such a way as to be a nuisance to the occupation of the house, and will not operate as a denial of the plaintiff's occupation of the house.

ations.

In an action for obstructing a right of way, such plea will operate as a denial of the obstructing only, and not of the plaintiff's right of way.

In an action for slander of the plaintiff in his office, profession or trade, the plea of Not Guilty will operate in denial of speaking the words, of speaking them maliciously, and in the defamatory sense imputed, and with reference to the plaintiff's office, profession or trade, but it will not operate as a denial of the fact of the plaintiff's holding the office or being of the profession or trade alleged.

In actions for an escape, it will operate as a denial of the neglect or default of the sheriff or his officers, but not of the debt, judgment, or preliminary proceedings.

In actions against a carrier, the plea of Not Guilty will operate as a denial of the loss or damage, but not of the receipt of the goods by the defendant as a carrier for hire, or of the purpose for which they were received.

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72. All matters in confession and avoidance shall be pleaded specially, as in actions on contract.

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73. In actions for trespass to land, the close or place in which, &c., must be designated in the declaration by name or abuttals, or other description, in failure whereof the plaintiff may be ordered to amend with costs, or give such particulars as the court or a judge may think reasonable.

uilty," of such tres-

74. In actions for trespass to land, the plea of Not Guilty shall operate as a denial that the defendant committed the trespass alleged in the place mentioned, but not as a denial of the plain-

tiff's possession or right to possession of that place, which if intended to be denied, must be traversed specially.

"Not guilty," effect of plea of, in actions for injuries to goods.

75. In actions for taking, damaging, or converting the plaintiff's goods, the plea of Not Guilty shall operate as a denial of the defendant having committed the wrong alleged, by taking, damaging, or converting the goods mentioned, but not of the plaintiff's property therein.

Defences arising after commencement of action. How pleaded.

76. A plea containing a defence arising after the commencement of the action may be pleaded together with pleas of defence arising before the commencement of the action, provided that the plaintiff may confess such plea, and thereupon shall be entitled to the costs of the cause up to the time of the pleading of such first mentioned plea.

Matters of defence arising since last pleading. How pleaded, &c.

77. When a plea is pleaded with an allegation that the matter of defence arose after the last pleading, the plaintiff shall be at liberty to confess such plea, and shall be entitled to the costs of the cause up to the time of pleading such plea, provided that this and the preceding rule shall not apply to the case of such plea pleaded by one or more only out of several defendants.

XIII. Replevin.

Replevin, proceedings in.

78. In actions for the replevin of property under the statutes of this State, the writ and summons shall be made returnable as process in other actions, and the proceedings therein shall be had as in other cases, except where otherwise prescribed by statute.

XIV. Mandamus and Quo Warranto.

Mandamus and quo warranto, practice in.

79. The Circuit Courts being "empowered to issue writs of *mandamus* and *quo warranto* in vacation as well as in term," (Chap. 1561, Sec. 2, Laws of Fla.,) will prescribe the time for the return of process and the filing of the pleadings in each case as it arises. In the exercise of this discretion the judge will have due regard for the rights of the parties, and will regulate the practice so as to secure as speedy a determination of the cause as is justified by the circumstances of each case.

XV. Attachments. Process of Garnishment. Orders attaching debts due Judgment Debtors by persons within the jurisdiction of the Court.

Ordinary attachments issued upon the institution of a suit, or during its pendency. (Th. Dig., 367 to 372, chap. 250, 998, 1,101.)

80. Attachments issued upon the institution of a suit and at the same time with the summons, shall be made returnable to the same rule day to which the summons in the case is made returnable. If issued after the institution of the suit, the attachment shall be made returnable to the next rule day after it is issued, if ten days shall intervene between the day upon which it is is-

When returnable.

Rules of pleading same as in ordinary actions.

Where there is personal service defaults and judgments may be entered by clerk.

Pleadings where the service is by publication.

Defaults.

Judgment.

Execution.

sued and the next rule day, or to such other rule day as may be directed by the plaintiff. The filing of the declaration and other pleadings in a suit commenced by attachment shall be governed by the same rules which govern in ordinary actions, *and where there is personal service*, defaults and judgments in such action may be entered as in other actions. *Where the service is by publication*, the plaintiff shall be held to file his declaration on the day named in the publication for the appearance of the defendant, and the defendant shall be held to enter his appearance upon the next rule day thereafter, and to file his plea upon the next succeeding rule day as in other actions, and the subsequent course of pleading shall be as in other actions. Defaults may be entered as in other cases, and in case of default in appearance and in filing a plea, the plaintiff may thereupon apply to the court, if in term, or to the judge, if in vacation, for final judgment in accordance with the provisions of the statute in such case made and provided. (Section 8, Chapter 1938, Laws of Florida.) Upon such judgment, execution may issue in accordance with law.

Garnishments other than to persons residing within the jurisdiction and owing judgment debtors. Tho. Dig. 371 to 376, Chap. 1100.

When returnable.

Appearance.

Judgment for default in appearance. For what amount to be entered.

Scire facias thereon. When returnable.

Order confirming judgment in case of default.

In case of appearance, statement shall be filed.

81. Attachments or garnishments of debts due and owing to judgment debtors *by persons residing within the jurisdiction of the court*, are regulated by the next succeeding rule. These attachments or garnishments are controlled by the provisions of Sections 64-5-6-7 of Chapter 1096, Laws of Florida.

All other writs of garnishment, whether issued before or after judgment, shall be returnable to rule days in the same manner as are writs of summons in ordinary actions. The garnishee shall be held to enter his appearance upon the rule day to which the writ is returnable. In case of his failure so to do, his default may be entered, and thereupon a "judgment by default" may be entered at the time in which judgment upon such default may be entered in ordinary actions. Such judgment shall be in the form authorized by law, (Thomp. Dig., par. 1, page 373,) and shall be in amount equal to the judgment debt and costs, in case it is a garnishment upon a judgment, and in case it is a garnishment issued before final judgment, then for the amount stated in the cause of action with interest thereon. Upon the entry of such judgment, a scire facias shall issue against such garnishee in the form authorized by law, (Thomp. Dig., par. 1, page 373,) returnable to the next succeeding rule day, if ten or more days shall intervene between such day and the date of issuing the same, or to any subsequent rule day at the option of the plaintiff. In case of failure to appear at such rule day, the clerk shall enter such default, as well as an order confirming such prior judgment, and in ten days thereafter may issue execution. In case the garnishee shall enter his appearance to the writ of garnishment or to the *scire facias*, he shall be held upon the next succeeding rule day to file a statement under oath, in which he shall answer as to the matters inquired of in the

writ of garnishment. Failing so to do, the clerk shall enter such default, and at the same or any subsequent rule day shall, upon motion of the plaintiff, enter an order confirming such judgment before entered, upon which execution may issue as in other cases. Should the garnishee appear, and, by his statement filed under oath, admit any indebtedness, or that he has or had at the time of service of said summons any goods, moneys, chattels or effects in his or her hands belonging to said defendant or defendants, and the plaintiff is satisfied with the statement, then the court may, at the next term, enter a judgment against such garnishee for the amount so confessed, and execution may issue as in other cases against said garnishee. If, however, the plaintiff is not satisfied with the statement of the garnishee, he shall, on the same or any subsequent rule day, file a statement traversing the allegations of the garnishee in such particulars as he desires, and the issue thus made shall stand for trial at the next term of the court.

In case of failure, order confirming judgment.

Execution thereon.

Admission of garnishee.

Judgment thereon.

Traverse and issue.

When tried.

In case the garnishment is issued before final judgment, (Chap. 1100, Laws of Florida,) no money shall be paid to the plaintiff in the original suit until after judgment therein in his favor.

82. *Where the party owing the judgment debtor is within the jurisdiction of the court*, the order directing the person upon whom the attachment of a debt due to the judgment debtor has been or is to be served to appear and show cause why he should not pay the judgment creditor the debt due from him to the judgment debtor, shall specify the amount of the judgment debt, shall be made returnable to rule days as writs in ordinary actions, and shall be served and returned in like manner. Upon the service of the order, the party owing the debt, in the event he does not dispute the debt, may pay into court the amount due from him to the judgment debtor, or an amount equal to the judgment debt. Such payment to be made to the clerk of the court. In the event he disputes the debt, he shall be held to enter his appearance upon the return day of the order or upon or before that day to enter a statement that he disputes the debt claimed to be due from him to the judgment debtor. Upon failure to enter his appearance or to file such statement on or by the rule day to which the order is returnable, the clerk shall enter such default, and the judge may, upon such rule day or at any time thereafter, order execution to issue from the clerk's office, and such execution may issue at any time after the expiration of ten days from the making of such order against such person owing the judgment debtor for the amount of the debt and costs of suit. In case an appearance is entered, or such statement is filed, or the party does not admit the debt to the extent that it is due in the opinion of the judgment creditor, he may cause a writ to be issued directed to the party owing the judgment debtor, calling upon him to show cause why there should not be execution against him for the alleged judgment debt, or for the amount due

Attachment orders or garnishments when the party owing the judgment debtor resides within the jurisdiction of the court. Sections 64-5-6-7, Chap. 1096, Laws.

When returnable and how served.

Payment into court when debt admitted.

Disputing the debt, shall enter his appearance.

Failing to enter appearance or to file statement, default shall be entered and Judge may order execution to issue.

In case of statement writ to be issued.

Form of writ and how served and returned.

by him to the judgment debtor if it is known to be less than the judgment debt, and for costs of suit. Such writ shall be returnable to the next or any subsequent rule day after the appearance is entered or statement filed, and shall be served and returned as other writs upon the institution of an action. The judgment creditor shall be held to file his declaration upon the rule day as prescribed in ordinary actions. The defendant shall be held to appear to this writ on the rule day to which it is returnable, and in case of default, there may be judgment. The defendant shall be held to file his plea or demurrer on the next succeeding rule day thereafter, and the subsequent pleadings shall be as in other actions, and like judgments for defaults in pleading, and other proceedings may be had in this case as in other actions. The final judgment in such proceeding shall be that the judgment creditor shall have execution against the person owing the judgment debtor for the amount of the debt due, with costs of suit, if the debt due does not exceed the judgment debt, and if it does exceed the judgment debt, then for an amount equal to said debt, with costs of suit.

ration writ.

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The following forms may be used under this rule. Any variance therefrom shall not affect the regularity or validity of the proceeding, if the form used conforms to the law and the rules of court controlling the subject:

s under 64-5-6-7 1096,

Form of order attaching debt and order to show cause, under Section 64, Chapter 1096, Laws of Florida.

THE STATE OF FLORIDA.

TO E. F. GREETING:

In the Circuit Court,
———Judicial Circuit,
———County.

Whereas, A. B., on the——day of————A. D. 187——, recovered in our said court a judgment against *C. D.* for the sum of————dollars————cents; And Whereas, Said A. B. [*or* G., "his attorney," *as the case may be,*] has made an affidavit before the clerk of our said court that said judgment is still unsatisfied, and that you, the said E. F., are indebted to the said C. D., and are within the jurisdiction of the court.

ing nd to cause.

Now, therefore, it is ordered that all debts owing or accruing from you to the said C. D. are attached to answer the said judgment which A. B. recovered against C. D., as aforesaid, the same being for the sum of———dollars and———cents.

It is further ordered that you appear before our said court, at the clerk's office, in the———of———on the first Monday in ———next, the same being a rule day of our said court, and show cause why you should not pay the said A. B. the debt due

from you to the said C. D. or so much thereof as may be sufficient to satisfy the judgment debt aforesaid.
[L. S.] Witness, &c., &c.

Note.—Take notice that the service of this order binds such debts in your hands, that you may pay the amount of such debt, or so much thereof, as is necessary to pay the judgment debt to the clerk of this court, and that if you do not enter an appearance on the rule day stated or upon or before that day file a statement disputing the debt, an order awarding execution against you will be entered, and execution will issue for the amount of the judgment debt.
————————, Clerk, &c.

Form of Fi. Fa. under Section 66:

THE STATE OF FLORIDA.

To all and every the Sheriffs of the State of Florida, Greeting:

Fi. fa. to be issued under order of Judge.

We command you that of the goods and chattels, lands and tenements of E. F., you cause to be made the sum of———dollars and———cents, being the amount of (*or* part of the amount of, *if the debt be more than the judgment debt,*) a debt due from the said E. F. to C. D., heretofore attached in the hands of the said E. F. by an order of the Circuit Court for the county of ———in the———circuit, dated the——day of———, A. D. 187——, pursuant to the statute in such case made to satisfy [*or if the debt be less than the judgment debt, say towards satisfying,*]———dollars and———cents, which A. B. lately, in our said court, to-wit: on the——day of——A. D. 187——, recovered against the said C. D., whereof the said C. D. is convicted, together with the sum of———dollars and———cents in addition thereto, the same being the costs of this proceeding against the said E. F., and the costs of this writ and your proceedings hereon, and that you have the said sums of money before the judge of our said court at——, when this writ is satisfied, to render unto the said A. B. the sums aforesaid, and have then and there this writ.
[L. S.] Witness, &c.

Form of writ under Section 67:

THE STATE OF FLORIDA.

TO E. F. GREETING:

Writ against garnishee.

We command you personally to be and appear before the Circuit Court for the———Circuit in the county of———on the

first Monday in———next, at the clerk's office, in the———of ———to show cause why A. B. should not have execution against you for———dollars and———cents, being the amount (*or* part of the amount, *as the case may be,*) of a debt due from you to C. D. to satisfy, (*or* towards satisfying, *as the case may be,*)———dollars and———cents, which, on the——day of—— A. D. 187——, the said A. B., by a judgment of our said court, recovered against the said C. D., and for costs of suit in this behalf. Take notice that in default of your appearance, the said A. B. may proceed to execution.

[L. S.] Witness, &c.

Form of declaration upon writ under Section 67:

CIRCUIT COURT OF FLORIDA,———Judicial Circuit,

To———Rule Day, A. D. 187—,———County:

Declaration in suit upon writ.

A. B., by———, his attorney, (*or* "in person," *as the case may be,*) sues E. F. by a writ issued out of this court in these words: [*copy the writ,*] and the said E. F. has appeared to the said writ, and the said A. B., by his attorney aforesaid, (*or* "in person," *as the case may be,*) says that the said debt due from the said E. F. to the said C. D. is for (*here state the debt as in a declaration in ordinary cases,*) and the said A. B. prays that execution may be adjudged to him accordingly for the said sum of———dollars and———cents, and for costs in this behalf.

Form of plea under Section 67:

IN THE CIRCUIT COURT OF FLORIDA.

———Judicial Circuit,

To——Rule Day, A. D. 187—.

———County, to-wit:

Plea.

The defendant, E. F., by———, his attorney, (*or* "in person," *as the case may be,*) says that he never was indebted to the said C. D., as alleged, [*or plead such other defence or several defences as in other cases.*)

Form of judgment for plaintiff under Section 67:

Judgment for plaintiff.

[*The same as in ordinary cases to the statement of the judgment which may be thus:*] Therefore, it is considered by the court that the said A. B. have execution against the said E. F. for the said———dollars and———cents, the amount (*or* part of the amount, *as the case may be,*) of the said debt due from

him to the said C. D. to satisfy (*or* towards satisfying, *if the debt be less than the judgment debt*,) the said———dollars and———cents, which the said A. B., on the——day of———, A. D. 187—, by the judgment of this court, recovered against the said C. D., and it is further considered that the said A. B. do recover against the said E. F. ———dollars and———cents, costs of suit in this behalf.

Fi. Fa. upon judgment for plaintiff under Section 67:

THE STATE OF FLORIDA.

To all and every the Sheriffs of the State of Florida, Greeting:

Fi. fa. upon judgment for plaintiff.

We command you that of the goods and chattels, lands and tenements of E. F., you cause to be made the sum of———dollars and———cents, the amount, (*or* part of the amount, *as the case may be*,) of a debt due from the said E. F. to C. D. to satisfy (*or* towards satisfying, *as the case may be*,)———dollars and———cents, which A. B., on the——day of———, A. D. 187—, (*date of judgment against judgment debtor*,) by the judgment of the Circuit Court of the State of Florida for the—— Judicial Circuit for the County of———, recovered against the said C. D., and that you also cause to be made the additional sum of———dollars and———cents, which, in our said court, were adjudged to the said A. B. for his costs of suit which he hath been put to on occasion of our writ sued out against the said E. F. at the suit of the said A. B. in that behalf, as well as the costs of this writ and your proceedings hereon, and that you have the said sums of money before the judge of our said court at———, when this writ is satisfied, to render unto the said A. B. the sums aforesaid, and have then and there this writ.

[L. S.] Witness, &c.

XVI. Ejectment.

Ejectment.

83. The rules controlling the issuing of summons, filing of declaration and other pleadings upon the part of parties, shall be applicable to actions of ejectment. The writ of summons shall be issued to the persons in possession, and to all persons claiming adversely or entitled to defend the possession of the property claimed. The property shall be described in a statement to be filed with the praecipe with reasonable certainty, and the amount claimed on account of mesne profits and of whom claimed, shall also be stated therein. A copy of this statement shall be annexed to the writ and shall be served with it. Any other person not named in the writ shall by leave of the court or judge, granted upon any rule day or in term, be allowed

Summons and statement in.

How served.

Other parties in possession may appear.

to appear and defend on filing an affidavit showing that he is in possession of the land either by himself or his tenant.

Defence by landlord.

84. Any person appearing to defend as landlord in respect of property whereof he is in possession only by his tenant, shall state in his appearance that he appears as landlord and such person shall be at liberty to set up any defence which a landlord appearing in an action of ejectment has heretofore been allowed to set up.

Defence may be limited to part of property.

85. Any person appearing to such writ shall be at liberty to limit his defense to a part of the property mentioned in the writ, describing such part with reasonable certainty in a notice to be served upon the plaintiff or his attorney, and then filed in the cause. An appearance confining the defence to no part, shall be deemed an appearance to defend for the whole.

Costs in case of nonsuit or dismissal. When defendant is in default for appearance at trial. Defaults in appearance and pleading.

86. If a plaintiff in ejectment be non-suited at the trial or the suit is dismissed on motion of the defendant, the defendant shall be entitled to judgment for his costs of suit. If the plaintiff in ejectment appear at the trial and the defendant does not appear, the plaintiff shall be entitled to proceed as in other cases. Defaults in appearance and pleading may be entered in ejectment as in other cases, but no final judgment for the plaintiff in such action shall be taken except in term.

XVII. Parties in Ejectment.

Death of one or more of several plaintiffs. How action may proceed thereon. How representative of deceased plaintiffs may be made parties.

87. In case of the death of one or more of several plaintiffs in ejectment, where the right does not survive to the remaining plaintiffs, the action may proceed at the suit of the surviving plaintiff for such share of the property as he claims, or the legal representative of the deceased plaintiffs may, upon the suggestion of the death and the filing of a certified copy of his letters testamentary or of administration, be made a party plaintiff upon any rule day either upon his own motion or upon the motion of the surviving plaintiff. Such order may be entered by the clerk at a rule day or by the court in term. A copy of the order making him a party shall be served upon the defendant.

Death of one of several defendants who defend jointly. Proceedings thereon.

88. In case of the death of one of several defendants in ejectment who defend jointly, a suggestion may be made of the death, and the action may proceed against the surviving defendant to judgment and execution against him, or an order making the legal representative of the deceased a party may be entered by the clerk at any rule day upon the filing of a certified copy of the letters testamentary or of administration. The legal representative shall be held to file the next pleading due, if any, at the rule day following ten days after a service of a copy of such order upon him.

Death of a sole defendant or of all the defendants.

89. In case of the death of a sole defendant or of all the defendants in ejectment, their representatives may be made

parties as in other actions. (See Rule 36. As to time of pleading, see Rule 92.)

Proceedings thereon.

90. In case of the death of one of several defendants in ejectment, who defends separately for a portion of the property for which the other defendant or defendants do not defend, the same proceedings may be taken as to such portion as in the case of the death of a sole defendant, (see Rule 36, and as to pleading see Rule 92,) or the plaintiffs may proceed against the surviving defendants in respect to the portion of the property for which they defend.

Death of one of several defendants who defends separately for property for which others do not defend.

Proceedings thereon.

91. In case of the death of one of several defendants in ejectment, who defends separately in respect of property for which surviving defendants also defend, it shall be the duty of the court in term, or the judge in vacation, to allow the legal representative of the deceased defendant to appear and defend on such terms as may appear reasonable and just. The court, or judge, in such case shall fix the time of pleading. If no such appearance is made, then the plaintiff upon suggesting the death and filing a copy of letters testamentary or of administration, may either have an order making such persons parties, such order to be granted upon a rule day by the clerk, upon previous notice, or he may proceed against the surviving defendant or defendants to judgment and execution. (As to time of pleading see Rule 92.)

Death of one of several defendants defending separately for property for which other defendants also defend.

Proceedings thereon.

92. In all cases in ejectment where upon the death of a defendant his legal representative has been made a party at the instance of the plaintiff (see Rules 89, 90, and 91,) the time for appearance and pleading by such legal representative shall be the same as prescribed in actions generally by Rule 36, unless it is otherwise provided by these rules, or by law.

Appearance and pleading by representatives of deceased defendants.

93. A sole plaintiff, or one of several plaintiffs in ejectment, may discontinue his action as to one or more of the defendants, upon such terms as the judge or court may direct.

Discontinuance.

94. In all cases where the rules as to making parties in other actions cannot be made applicable to actions of ejectment and there is no rule in ejectment, or statute controlling the subject, then the persons may be made parties upon motion and notice, in such manner and upon such terms as the judge may direct.

Where rules do not apply, court may regulate method of making parties.

95. If in any case there shall be a person in interest or possession, other than the executor or administrator of the deceased plaintiff or defendant, who shall be made a party plaintiff or defendant to the suit, he may be made a party, after such notice and such manner, and upon such terms as to pleading as the court or judge may direct. Such order may be made in vacation as well as in term.

Necessary parties other other than legal representative to be added by court.

96. Where the plaintiff recovers in ejectment, he may have one writ of execution, embracing a *habere facias possessionem* for the possession, and a *fieri facias* for his damages and costs, or he may if he so elects have separate writs, one a writ of *habere*

Final process may be one or two writs, as plaintiff elects.

facias possessionem for the possession, and a separate writ of *fieri facias* for his damages.

XVIII. Bill of Executions, Appeal from Common Law Judgments, Writs of Error, and "copies of proceeding" in causes.

Bill of exceptions, how made up.

97. The bill of exceptions shall be made up and signed during the term of the court at which the verdict is rendered or trial had, unless by special order further time is allowed. In case such special order is made, it shall be entered in the minutes, and in making up the bill of exceptions the fact that such an order was made shall be mentioned therein, or shall otherwise appear in the record.

When notice of settling exceptions shall be given.

98. Except in cases where the bill of exceptions is made up from memoranda in writing of the exceptions taken in open court containing the evidence upon which they are based as reduced to writing in open court, and approved by the judge at the time, the bill of exceptions shall be made up and settled upon notice to the adverse party. Should he fail to appear at the time specified in the notice, the judge shall proceed to settle and sign the exceptions in his absence.

Depositions taken upon interrogatories. How they shall be inserted in bill of exceptions.

99. Whenever it is necessary to insert in a bill of exceptions depositions of witnesses taken upon interrogatories, each interrogatory and its answer shall be entered consecutively, and not all of the interrogatories preceding all of the answers, or the substance of the whole or of such part of the testimony of each witness as is proper may be inserted without the interrogatories and answers thereto, if so agreed by the parties or their attorneys. The commission as well as the instructions and all other papers connected with the deposition, except as above directed, in the case of interrogatories and answers, shall be omitted unless some question has been raised and the decision or order of court made thereon has involved a consideration of such papers and it is necessary that they should be inserted in the bill of exceptions for the consideration of the Supreme Court. In case of a violation of this rule, all additional costs occasioned thereby both in the Circuit and Supreme Courts, shall be taxed against the appellant or plaintiff in error.

Commission and instructions shall not be inserted.

Application for and entry of appeal.

100. When an appeal is applied for in term time, the application shall be made in open court by the party taking the appeal, and the clerk of the Court shall make an entry upon the minute book stating that such application was made in open court. (Thomp. Dig. 446, Sec. 3,.) Where the appeal is applied for and entered in vacation, the application shall be made in writing, shall be signed by the party or the attorney of the party taking the appeal, and shall be filed with the papers in the cause.

Such applications for and entries of appeal may be in the following forms:

CIRCUIT COURT,————JUDICIAL CIRCUIT,
————COUNTY,————TERM A. D. 187—

A. B. }
vs. }
C. D. }

And now at the term of the court aforesaid comes the defendant by ———— his attorney, and in open court applies for and enters his appeal from the judgment herein rendered to the Supreme Court of the State of Florida, to be held at the City of Tallahassee on the ——— day of ———— A. D. 187— Forms of same.

———— Defendant's Attorney.

CIRCUIT COURT,————JUDICIAL CIRCUIT,
————COUNTY,————TERM A. D. 187—

A. B. }
vs. }
C. D. }

And now upon this ——— day of ———— A. D. 187— after the expiration of the term at which judgment was rendered in this cause, to wit: the ———— term A. D. 187— of this court, which expired on the ——— day of ———— A. D. 187— comes the defendant by his attorney and applies for and enters his appeal from said judgment to the Supreme Court of the State of Florida, to be held at Tallahassee on the ——— day of ———— A. D. 187—

———— Defendant's Attorney.

101. When an appeal is entered in the Circuit Court in a common law action, the appellant at the time of entering the appeal shall apply to the clerk of the Circuit Court from which the appeal is taken, or upon the filing of the transcript of the proceedings in the Supreme Court shall apply to the clerk of that court to issue a citation requiring the appellee or respondent to be and appear at the term of the Supreme Court to which the appeal is returnable, to show cause if any he can why the judgment should not be reversed. Such citation shall be served and returned in the same manner and with the like effect as a writ of *scire facias ad audiendum errores* upon a writ of error sued out. (Thomp. Dig. 447, Sec. 6.) Citations to be issued in common law appeals. How served and returned

This rule shall not apply to appeals which have been entered in open court during the term in which the judgment was rendered. Not necessar where appeal is taken in open court.

102. An original paper in the Circuit Court should not be sent up to the Supreme Court in any case, unless for some

Original papers, when they may be sent to Supreme Court.

special reason an inspection of the original paper is deemed necessary, in which event such original paper shall be transmitted by the clerk of the Circuit Court to the clerk of the Supreme Court upon an order of the judge of the Circuit Court or of one of the justices of the Supreme Court.

103. Appellants, plaintiffs in error, and clerks of the Circuit Court in making "copies of proceedings" in actions at law for the Supreme Court, and attorneys in framing bill of exceptions, will conform, as near as may be, to the following form. Any variance from these or any other forms prescribed in these rules shall not vitiate the varied forms, if they are otherwise correct in matter of substance and regular:

Form of copy of proceedings or a transcript of record where appeal is taken by defendant embracing a bill of exceptions.

Form of "copy of proceedings" (embracing a bill of exception,) where the appeal is entered by the defendant:

Pleas in the Circuit Court of the State of Florida for the ———— Judicial Circuit, in and for the county of ————, in a certain cause therein, wherein ———— is plaintiff and ———— is defendant.

Date of filing praecipe for summons.

Be it remembered that on the ——— day of ———— in the year of our Lord one thousand eight hundred and seventy —— came ———— plaintiff in the case aforesaid, by ———— his attorney, and filed in the clerk's office of the Circuit Court aforesaid his praecipe for a summons ad respondendum in the words and figures following, to wit:

Praecipe.

[Here insert Præcipe.]

Summons and endorsements thereon.

Whereupon a summons ad respondendum issued from the clerk's office aforesaid, which, with the return and endorsements thereon, is in the words and figures following:

[Here insert the summons and the endorsements of service, return and filing.]

Date of filing declaration.

And afterwards, to wit: on the ——— day of ———— in the year of our Lord one thousand eight hundred and seventy ——the plaintiff by his attorney filed in the clerk's office aforesaid his declaration in the words and figures following, to wit:

[Here insert declaration.]

Date of and entry of appearance of defendant.

And upon the same day [*or* afterwards, to wit on the ——— day of ———— in the year of our Lord one thousand eight hundred and seventy —— *as the case may be*] the defendant by his attorney ———— entered his appearance herein.

And afterwards, to wit: on the ——— day of ———— in

the year of our Lord one thousand eight hundred and seventy ——the said defendant by his attorney filed in the clerk's office aforesaid his plea in the words and figures following:

Date of filing plea.

[Here insert plea.]

[If a demurrer is interposed to the plea, then the entry will be as follows:

Form of entry where a demurrer is interposed.

And afterwards, to wit: on the ——— day of ———— in the year of our Lord one thousand eight hundred and seventy ——, the plaintiff by his attorney filed his demurrer to the said plea in the words and figures following, to wit:

(Here insert Demurrer.)

Entry of demurrer.

And afterwards, and on the ——— day of ———— in the year of our Lord one thousand eight hundred and seventy —— the defendant filed his joinder in demurrer in the words and figures following:

(Here insert joinder.)

Entry of joinder.

And afterwards, to wit: on the ——— day of ———— in the year of our Lord one thousand eight hundred and seventy —— and after due notice given, the said demurrer came on to be heard before the Hon. ———— Judge of the Circuit Court aforesaid, and after argument thereon, the following judgment (*or* order *as the case may be*) upon the demurrer was rendered.

Entry of hearing of and judgment upon demurrer.

(Here insert Judgment upon Demurrer.)

If the court decides against the sufficiency of the plea, and the defendant, not desiring to amend or to interpose a new defence, wishes to rest his case upon the plea, he must not amend or plead over, but must accept final judgment upon the demurrer, from which judgment he may appeal, or to it he may prosecute a writ of error.

If no demurrer is interposed, then enter the replication and subsequent pleadings (until the issues are formed,) in the same manner as is above prescribed for the declaration and plea. The trial of the issues, by the jury, will then be entered thus:

Entry of replication and subsequent pleadings.

And afterwards, to-wit: on the——day of———, in the year of our Lord one thousand eight hundred and seventy—, at a term of the Circuit Court of the———Judicial Circuit in and for the county aforesaid, held at the———of———came the said plaintiff and the said defendant by their respective attorneys, and thereupon came a jury, to-wit: [*here insert names of jurors*] who, being duly elected, tried and sworn the truth to speak upon the issues joined, having heard the evidence, the charge of the

Entry showing empanelling of jury and the trial of the cause.

court and the argument of counsel, and having considered of their verdict, upon their oaths do say:

Entry of verdict.

[Here insert verdict of the jury as written. If there is no motion in arrest of judgment made and disposed of, then enter the judgment of the court thus:]

Entry of judgment upon verdict.

And upon the same day [*or* afterwards, to-wit: on the——day of——, in the year of our Lord one thousand eight hundred and seventy—] the judgment of the court upon the said verdict was entered in the words and figures following, to-wit:

[Here insert the judgment. If there is a motion in arrest of judgment, then it should be entered after the entry of the verdict, and before judgment, thus:]

Motion in arrest of judgment, how entered.

Upon the rendition of which said verdict, the said defendant, by his attorney, entered a motion in arrest of judgment in the words and figures following, to-wit:

[Here insert motion.]

Which said motion being considered by the court, an order overruling and denying said motion, in the words and figures following, was made:

[Here insert order. Then will follow the judgment of the court upon the verdict thus:]

Judgment upon verdict.

Whereupon judgment upon the said verdict was entered by the court in the words and figures following, to-wit:

Forms of entry of a tender of a bill of exceptions.

[Here insert judgment. Then follows the bill of exceptions. If the exceptions taken during the progress of the cause are made up and signed during the term, the entry will be thus:]

When exceptions are settled and signed during the term.

And during the same term and upon the——day of———, in the year of our Lord one thousand eight hundred and seventy—the said defendant made up and tendered [in case the exceptions were not reduced to writing as required by rule 98, during the progress of the cause, then say after due notice to the adverse party] his bill of exceptions, which were settled and signed by the judge and ordered to be made a part of the record, which said bill of exceptions is in the words and figures following, to-wit:

[Here insert bill of exceptions. If the exceptions are made up after term by virtue of a special order to that effect, the entry will be thus:]

And after the expiration of said term, to-wit: on the——day

When settled after term by special order of court.

of———, in the year of our Lord one thousand eight hundred and seventy—, by virtue of a special order to that effect made, the said defendant made up and tendered [*in case the exceptions were not reduced to writing as required by rule 98, during the progress of the cause, then say after due notice to the adverse party,*] his bill of exceptions, which were settled and signed by the judge and ordered to be made a part of the record, which said bill of exceptions is in the words and figures following, to-wit:

(Here insert Bill.)

Form of Bill of Exceptions:

In the Circuit Court of Florida, ——— Judicial Circuit sitting in and for the county of ———, ———term, A. D. 187—.

Bill of exceptions.

Be it remembered that at a term of the Circuit Court of the ———Judicial Circuit of the State of Florida, for the county of ———, held at———on the——day of———, in the year of our Lord one thousand eight hundred and seventy—, a cause therein pending, wherein————was plaintiff and————was defendant, came on to be heard before the Hon. ————, Judge of said Circuit Court, at which day came the said parties by their respective attorneys. [*In the event there is a motion for a continuance before trial, and there has been an exception taken to the ruling of the court thereon, here set it out thus:*] And the said defendant moved the court to continue the said cause to the next regular term of the court upon the following grounds, viz: (*here insert grounds*) and filed the following affidavit: (*here insert affidavit.*) To the granting of which motion the said plaintiff did then and there object, because [*here insert in brief the objection urged*] and the said judge did then and there deliver his opinion and decide that the continuance should not be granted, and overruled said motion. To which said decision and ruling of said judge the defendant, by his attorney, did then and there except.

(*If any other motion, the ruling upon which can be reviewed upon appeal, before trial or before the jury is sworn, is made, overruled, and the ruling is excepted to, it should be inserted in a manner similar to that here stated in the instance of a motion for a continuance.*)

Bill of exceptions.

And thereupon the said issues in manner aforesaid joined between the said parties came on to be tried, and the jurors of the jury aforesaid, whereof mention is within made, being called, likewise came and were sworn to try the said issues in manner aforesaid joined, and thereupon the plaintiff, to maintain the issues of his part, produced and offered in evidence a certain promissory note, [*or other writing, setting*

out a copy of it,] but to the reading of the same in evidence the attorney for the said defendant did then and there object, because, &c., (*state the objection,*) but the said judge did then and there deliver his opinion and decide that the objection ought not to be allowed, and that the said writing ought to be admitted in evidence on the part of the said plaintiff, and thereupon permitted the said writing to be read in evidence on the part of the plaintiff, to which said opinion and decision the attorney for the said defendant in his behalf did then and there except.

Bill of exceptions.

And the said plaintiff, by his attorney, further to prove the issue in his behalf, then and there produced as a witness one J. K., and offered to prove by him that, [*stating what was intended to be proved by the witness,*] but to the admission of the said J. K. as a witness [*or* to the admission of the said matters so offered to be proved and given in evidence,] the attorney for the said defendant did then and there object, because, [*stating the objection,*] but the said judge did then and there deliver his opinion and decide that the said objection of the said defendant ought not to be allowed, and that the said J. K. ought to be admitted to testify, &c., [*or* said matter so offered in evidence ought to be admitted and received in evidence,] on behalf of the said plaintiff. To which opinion and decision of the said judge the said defendant, by his attorney, did then and there except.

And the said judge, the said parties concluded and submitted their testimony and the several matters aforesaid, did then and there give his opinion and deliver his charge to the jury that, &c., [*stating particularly and separately each specific portion of the charge to be excepted to; and after each such portion repeating exception, as follows:*] To which said opinion and charge of the court the said defendant, by his attorney, did then and there except.

Bill of exceptions.

And the said judge, under the charge and with the directions aforesaid, submitted the said issue and the evidence so given on the said trial to the jury, and the jury aforesaid then and there gave their verdict for the said plaintiff for the sum of———— dollars damages.

(When the appeal or writ of error is prosecuted upon the ground that a motion for a new trial is improperly denied, and that motion is made upon the ground that the verdict is contrary to the law and the evidence, then all of the evidence and the charge of the court, with the exceptions to the charge, should be embraced in the bill of exceptions. In such case, the preceding form will be varied to conform to the rule, and the whole of the testimony of each witness will be set forth as it occurred upon the trial, embracing the testimony of every witness for each party, as well as all other evidence introduced upon the trial. In such case, and in every case in which a motion for a new trial is overruled and the ruling is excepted to, after entering the rendition of the verdict as above, and before noting the fact of rendering judgment as below, proceed thus:)

And the said defendant, by his attorney, then and there, at the

term of the court aforesaid, did enter in writing and submit to the said court his motion that the said verdict be set aside, and that a new trial be granted, [*or his motion in arrest of judgment,*] for reasons following, to-wit: [*stating the grounds of the motion.*] And the said motion coming on to be heard on the ——day of———, at the term aforesaid, [*or at a subsequent term, if the hearing of the motion shall have been postponed,*] the said court did consider and decide that the said motion should not be granted, to which decision the said defendant, by his attorney, did then and there except. Bill of exceptions.

Whereupon the court aforesaid, on the——day of———, A. D. 187—, at the term aforesaid, did render judgment in favor of the said plaintiff and against the said defendant for the sum of ———dollars damages and———dollars costs, as appears of record, and inasmuch as the said several matters objected to or insisted upon and considered by the court do not appear by the record of the verdict and judgment aforesaid, the said defendant, by his counsel aforesaid, did then and there [*or in case by special order further time has been allowed and the bill has been made up after term, then say*: did on the——day of——, A. D. 187—, after the expiration of the term of court aforesaid,by virtue of a special order herein made,] propose this his bill of exceptions to the said opinions and decisions of the said judge and request him to sign the same, according to the form of the statute in such case made and provided, which is done this——day of———, A. D. 187—. Bill of exceptions.

———————————,

Judge of the Circuit Court———,
Judicial Circuit of Florida.

(After the bill of exceptions will follow the entry of appeal. If the application for and entry of the appeal is in term, then proceed as follows:)

And the said defendant, during the said term, in open court applied for and entered his appeal from the said judgment to the Supreme Court of the State of Florida, which said entry of appeal is as follows: Entry of the appeal, when the appeal is in term.

(Here insert entry of appeal. If the application and entry are in vacation, then proceed thus:)

And the said defendant, after the expiration of the term of the said court at which the judgment aforesaid was rendered, entered his appeal therefrom in the clerk's office in the words and figures following: Entry where it is in vacation.

Here insert entry of appeal. After the entry of appeal will follow the copy of the bond given by the defendant as follows:

And afterwards (*or* upon the same day, *as the case may be,*) the defendant filed his bond, which, with the approval thereof, is in the words and figures following, to-wit:

(Here insert bond and approval. Then follows the certificate of the clerk, which may be thus:)

Certificate of clerk to copy of proceedings or transcript of record.

I, ————————, Clerk of the Circuit Court of the State of Florida, ——— Judicial Circuit in and for the county of———, do hereby certify that the foregoing pages, numbered from one to———inclusive, constitute a true copy of all of the proceedings and a correct transcript of the record of the judgment in the case ————————, plaintiff, and ————————, defendant, as appears upon the files and records of my office.

In testimony whereof I have hereunto set my hand and affixed the seal of said court this the——day of [L. S.] ———, in the year of our Lord one thousand eight hundred and seventy—.

————————————,
Clerk of the Circuit Court for the county of————.

Note.—Where a writ of error is sued out, or the *plaintiff* takes the appeal, the above form must be varied to suit the change of circumstances and the different requirements of law applicable to such proceedings. The bill of exceptions in a criminal case should be sealed by the judge. Chapter 138, Sec. 1, Laws of Florida.

RULES OF PRACTICE

FOR THE GOVERNMENT OF

THE CIRCUIT COURTS

IN SUITS IN EQUITY.

I. General Rules, Dockets, Order-Book, Motions, Orders, Notices.

Dockets for chancery causes.

Rule 1. The clerk shall keep a General Docket for Chancery Causes, in which all cases shall be entered upon the filing of the bill. This docket shall contain memorandum entries showing the progress of each case. In the Bench and Bar docket, prepared for each term, he shall enter all cases in equity which are undisposed of. After the discharge of the jury it shall be the duty of the Judge of the Circuit Court at each term to call and sound the chancery docket. Any cause not disposed of within three years from the filing of the bill shall be dismissed by the court at the cost of the plaintiff, unless otherwise directed for cause shown. Upon application and notice within a reasonable time, not exceeding one year, the cause may be reinstated upon the docket, in the discretion of the court.

To be called each term.

When court may dismiss cause and be reinstated.

Circuit Courts as a court of equity always open.

2. The Circuit Courts, as courts of equity, are by law deemed always open, and may dispose of all motions and grant all orders and render all decrees, whether interlocutory or final, either in term time or vacation. The clerk's office shall be open at all times for the purpose of receiving, entering, entertaining and disposing of all motions, rules, orders and other proceedings, which are grantable of course and applied for, or had by the parties or their solicitors, in all causes pending in equity, in pursuance of the rules hereby prescribed.

Proceedings grantable of course may be entered in clerk's office at any time.

Order book what shall be entered in

3. All motions, rules, orders, decrees and other proceedings made and directed at chambers, or on rule days at the clerk's office, whether special or of course, shall be entered by the clerk in an order book, to be kept at the clerk's office, on the day when they are made and directed; which book shall be open at all

Shall be open to inspection of all parties.

Entry in order book shall be sufficient notice of proceedings.

No notice of filing of any pleading required.

How notices may be served.

office hours to the free inspection of the parties in any suit in equity, and their solicitors; and except in cases where personal or other notice is specially required or directed, such entry in the order book shall be deemed sufficient notice to the parties and their solicitors, without further service thereof, of all orders, rules, acts, notices and other proceedings, entered in such order book, touching any and all the matters in the suits to and in which they are parties and solicitors. No notice of the filing of any answer, plea, demurrer, replication, or other paper shall be necessary to be served upon the opposite party or his solicitor, unless such notice is directed by special order of the judge; and notice to the solicitors shall be deemed notice to the parties for whom they appear and whom they represent, in all cases where personal notice on the parties is not otherwise specially required. Where the solicitor for all the parties in a suit, reside in or near the same town or city, the Judges of the Circuit Court may, by rule, abridge the time for notice of rules, orders or other proceedings, not requiring personal service on the parties, in their discretion.

What are deemed motions and applications grantable of course.

4. All motions and applications in the clerk's office for the issuing of mesne process and final process to enforce and execute decrees, for filing bills,answers, pleas,demurrers and other pleadings; for making amendments to bills and answers; for taking bills *pro confesso;* for filing exceptions, and for other proceedings in the clerk's office, which do not by law or by the rules of court require an allowance or order of the court or judge, shall be deemed motions and applications, grantable of course by the clerk of the court. But the same may be suspended or altered or rescinded by the judge or court upon special cause shown.

How motions for orders not grantable of course may be made and heard.

5. All motions for rules or orders and other proceedings which may not be grantable of course, may be made at any time before the judge of the court, due notice being given to the adverse party, and if the adverse party or his solicitor not appear on the day named in the notice or order of the judge fixing the day, or shall not show good cause against the same, the motion may be heard by the judge and granted or refused, as the right of the matter may seem to him to require.

II. Process.

Mesne process. Subpoena, attachment, sequestration, and writ of assistance.

6. The process of subpoena shall constitute the proper mesne process in all suits in equity, in the first instance, to require the defendant to appear and answer the exigency of the bill, and unless otherwise provided in these rules, or specially ordered by the Circuit Court, a writ of attachment, and if the defendant cannot be found, a writ of sequestration, or a writ of assistance to enforce a delivery of possession, as the case may require, shall be

the proper process to issue for the purpose of compelling obedience to any interlocutory or final order or decree of the court.

Final process.

7. Final process to execute any decree may, if the decree be solely for the payment of money, be by a writ of execution, in the form used in the Circuit Court in suits at common law. If the decree be for the performance of any specific act, as for example, for the execution of a conveyance of land, or the delivering up of deeds or other documents, the decree shall, in all cases, prescribe the time within which the act shall be done, of which the defendant shall be bound without further service to take notice; and upon affidavit of the plaintiff, filed in the clerk's office, that the same has not been complied with within the prescribed time, the clerk shall issue a writ of attachment against the delinquent party, from which, if attached thereupon, he shall not be discharged, unless upon a full compliance with the decree and the payment of all costs, or upon a special order of the court, or of the judge thereof, upon motion and affidavit, enlarging the time for the performance thereof. If the delinquent party cannot be found, a writ of sequestration shall issue against his estate upon the return of *non est inventus*, to compel obedience to the decree.

Fieri facias.

Decrees directing acts to be performed or done shall specify the time in which to be done.

Clerk may issue attachment against delinquents.

Writ of sequestration, when may issue.

Writ of assistance to compel delivery.

8. When any decree or order is for the delivery of possession, upon proof made by affidavit of a demand and refusal to obey the decree or order, the party prosecuting the same shall be entitled to a writ of assistance from the clerk of the court.

Orders in favor of or against persons not parties. How enforced.

9. Every person, not being a party in any cause, who has obtained an order, or in whose favor an order shall have been made, shall be enabled to enforce obedience to such order by the same process as if he were a party to the cause; and every person, not being a party in any cause, against whom obedience to any order of the court may be enforced, shall be liable to the same process for enforcing obedience to such order, as if he were a party in the cause.

III. Process. How Issued, Served and Returned.

Subpœna. When to issue.

10. No process of subpoena shall be issued from the clerk's office in any suit in equity until the bill is filed in the office.

When to be returnable.

11. Whenever a bill is filed, the clerk shall issue a subpoena thereon, as of course, upon the application of the plaintiff, which shall be made returnable to the next rule day thereafter, unless there shall not be ten days intervening between the day of the issuing of the same and the next rule day, in which case the same shall be made returnable to the rule day in the next succeeding month. Where there is more than one defendant, the clerk shall issue but one writ of subpoena against all of the defendants, unless otherwise directed by the complainant or his solicitor.

One writ shall embrace all of the defendants.

12. The service of all subpoenas shall be by delivery of a copy

Service and return of subpœna.

thereof to such defendant, showing the original at the time of such delivery, or to the wife of such defendant, or any person above the age of fifteen years, residing in his or her family at the time of such delivery, at the dwelling house or usual place of abode of such defendant. On the back of the copy of the subpoena such indorsements shall be made as are required by law, and the statement and return upon the original subpoena shall be as prescribed by law. (Thomp. Dig. 451.)

Alias subpœna when to issue.

13. Whenever any subpoena shall be returned not executed as to any defendant, the plaintiff shall be entitled to another subpoena, *toties quoties*, against such defendant, if he shall require it, until due service is made.

What officer shall serve process.

14. The service of all process, mesne and final, shall be the proper sheriff or his deputy, or by some other person specially appointed by the court for that purpose, and not otherwise; in the latter case the person serving the process shall make affidavit thereof in conformity to law. (Thomp. Dig. 451.)

IV. Appearance.

Appearance When to be entered.

15. The appearance day of the defendant shall be the rule day to which the subpoena is made returnable; provided he has been served with the process ten days before that day, otherwise his appearance day shall be the next rule day succeeding the rule day when the process is returnable.

Where to be entered.

16. The appearance of the defendant, either personally or by his solicitor, shall be entered in the order book and docket of chancery causes on the day thereof by the clerk.

V. Frame of Bills.

Bill in Chancery. Introductory part.

17. Every bill in the introductory part thereof shall contain the names and places of abode of all the parties; plaintiffs and defendants, by and against whom the bill is brought. The form in substance shall be as follows:

To the Judge of the Circuit Court of———— Judicial Circuit of the State of Florida, in and for ———— County, in Chancery sitting:

A. B., of ————, brings this, his bill, against C. D., of ————, and E. F., of ————. And thereupon your orator complains and says, that, &c.

Confederacy clause, charging part, and jurisdictional averments, may be omitted.

18. The plaintiff, in his bill, shall be at liberty to omit, at his option, the part, which is usually called the common confederacy clause of the bill, averring a confederacy between the defendants to injure or defraud the plaintiff; also what is commonly called the charging part of the bill, setting forth the matters or excuses, which the defendant is supposed to intend to set up by way of

defence to the bill; also what is commonly called the jurisdiction clause of the bill, that the acts complained of are contrary to equity, and that the defendant is without any remedy at law; and the bill shall not be demurrable therefor. And the plaintiff may, in the narrative or stating part of his bill, state and void, by counter-averments, at his option, any matter or thing which he supposes will be insisted upon by the defendant, by way of defence or excuse to the case made by the plaintiff for relief.

19. Every bill shall be expressed in as brief and succinct terms as it reasonably can be, and shall contain no unnecessary recitals of deeds, documents, contracts or other instruments, in *haec verba*, or any other impertinent matter or any scandalous matter not relevant to the suit. If it does, and if so found by the judge or court on exceptions, the master shall be expunged at the expense of the plaintiff, and he shall pay to the defendant all his costs in the suit up to that time, unless the court or judge shall otherwise order.

Instrument shall not be inserted in nor shall it contain matter not relevant to the suit.

20. No order shall be made by any judge expunging matter for scandal or impertinence unless exceptions are taken in writing and signed by counsel, describing the particular passages which are considered to be scandalous or impertinent; or unless the exceptions shall be filed on or before the next rule day, after the process on the bill shall be returnable, or after the answer or pleading is filed. The exception shall be taken as abandoned unless the party making them shall, on or before the next rule day, set the same down for hearing. Nothing herein shall prevent the court from referring the matter to a master as heretofore authorized. (Nos. 26 and 27, old Eq. Rules.)

How scandalous and impertinent matter may be expunged.

VI. Interrogatories.

21. It shall not be necessary to interrogate a defendant specially and particularly upon any statement in the bill, unless the complainant desires to do so to obtain a discovery.

When necessary to interrogate defendant.

22. Instead of the words of the bill now in use preceding the interrogating part thereof, and beginning with the words, "To the end, therefore," there shall hereafter be used words in the form or to the effect following: "To the end, therefore, that the said defendants may, if they can, show why your orator should not have the relief hereby prayed, and may, upon their several and respective corporal oaths, and according to the best and utmost of their several and respective knowledge, remembrance, information and belief, full, true, direct and perfect answer make to each of the several interrogatories hereinafter numbered and set forth, as by the note hereunder written, they are respectively required to answer, that is to say:

Form of bill preceding the interrogatories.

Form of interrogatories.

1—Whether, &c.

2—Whether, &c.

23. The interrogatories which each defendant is required to

Plaintiff shall require defendants to answer interrogatories by note at the foot of the bill.

answer shall be specified in a note at the foot of the bill, in the form or to the effect following, that is to say: "The defendant, A. B., is required to answer the interrogatories numbered respectively 1, 2, 3," &c., and the office copy of the bill taken by each defendant shall not contain any interrogatories except those which such defendant is so required to answer, unless such defendant shall require to be furnished with a copy of the whole bill.

Such note shall be considered part of the bill.

24. The note at the foot of the bill specifying the interrogatories which each defendant is required to answer, shall be considered and treated as part of the bill, and the addition of any such note to the bill, or any alteration in or addition to such note after the bill is filed, shall be considered and treated as an amendment of the bill.

VII. Prayer of the Bill.

Prayer of the bill, how framed. Special orders shall be specially asked for.

25. The prayer of the bill shall ask the special relief to which the plaintiff supposes himself entitled, and also shall contain a prayer for general relief; and if an injunction or a writ of *ne exeat regno*, or any other special order pending the suit, is required, it shall also be specially asked for.

Prayer for process.

26. The prayer for process of subpoena in the bill shall contain the names of all the defendants named in the introductory part of the bill, and if any of them are known to the infants under age, or otherwise under guardianship, shall state the fact, so that the court may take order thereon as justice may require, upon the return of the process. If an injunction, or a writ of *ne exeat regno*, or any other special order pending the suit, is asked for in the prayer for relief, that shall be sufficient without repeating the same in the prayer for process.

What shall contain.

Bill shall be signed by counsel.

27. Every bill shall contain the signature of counsel annexed to it, which shall be considered as an affirmation on his part that upon the instructions given to him and the case laid before him, there is good ground for the suit in the manner in which it is framed.

VIII. Cross Bill.

Defendant shall answer original bill before plaintiff shall answer cross bill.

28. Where a defendant in equity files a cross bill for discovery only against the plaintiff in the original bill, the defendant to the original bill shall first answer thereto before the original plaintiff shall be compelled to answer the cross bill. The answer of the original plaintiff to such cross bill may be read and used by the party filing the cross bill, at the hearing, in the same manner and under the same restrictions as the answer praying relief may now be read and used.

IX. Parties.

When the court may dispense with some of the parties.

29. Where the parties on either side are very numerous, and cannot, without manifest inconvenience and oppressive delays in the suit, be all brought before it, the court, in its discretion, may dispense with making all of them parties, and may proceed in the suit, having sufficient parties before it to represent all the adverse interests of the plaintiffs and the defendants in the suit properly before it; but in such cases the decree shall be without prejudice to the rights and claims of all the absent parties.

When suits may be brought against trustees and executors without joining persons beneficially interested.

Court may order such parties brought in.

30. In all suits concerning real estate which is vested in trustees by devise, and such trustees are competent to sell and give discharges for the proceeds of the sale, and for the rents and profits of the estate, such trustees shall represent the persons beneficially interested in the estate or the proceeds, or the rents and profits, in the same manner and to the same extent as the executors or administrators in suits concerning personal estate represent the persons beneficially interested in such personal estate, and in such cases it shall not be necessary to make the persons beneficially interested in such real estate, or rents and profits, parties to the suit; but the court may, upon consideration of the matter on the hearing, if it shall so think fit, order such persons to be made parties.

Heir at law not a necessary party where the trusts of a will are sought to be executed.

31. In suits to execute the trusts of a will, it shall not be necessary to make the heir at law a party, but the plaintiff shall be at liberty make the heir at law a party, where he desires to have the will established against him.

Where the demand is joint and several, plaintiff may proceed against one or more.

32. In all cases in which the plaintiff has a joint and several demand against persons, either as principals or sureties, it shall not be necessary to bring before the court, as parties to a suit concerning such demand, all the persons liable thereto, but the plaintiff may proceed against one or more of the persons severally liable.

Objection by defendant of want of proper parties.

Plaintiff may set down for hearing.

If he does not, the bill may be dismissed upon hearing of the cause.

33. When the defendant shall by his answer suggest that the bill is defective for want of parties,the plaintiff shall be at liberty, within fourteen days after answer filed, to set down the cause for argument upon that objection only, and the purpose for which the same is so set down shall be notified by an entry, to be made in the clerk's order book, in the form or to the effect following; that is to say: "Set down upon the defendant's objection for want of parties." And where the plaintiff shall not so set down his cause and have his objection heard, but shall proceed therewith to a hearing, notwithstanding an objection for want of parties taken by the answer, he shall not, at the hearing of the cause, if the defendants' objection shall then be allowed, be entitled, as of course, to an order for liberty to amend his bill by adding parties. But the court, if it thinks fit, shall be at liberty to dismiss the bill.

Where defendant objects only at at the hearing to parties Court may make decree saving rights of absent parties.

34. If a defendant shall, at the hearing of a cause, object that a suit is defective for want of parties not having by plea or answer taken the objection, and therein specified by name or description the parties to whom the objection applies, the court, if it shall think fit, shall be at liberty to make a decree saving the rights of the absent parties.

Nominal parties to bills may appear and answer at their option.

35. Where no account, payment, conveyance or other direct relief is sought against a party to a suit not being an infant, the party, upon service of the subpoena upon him, need not appear and answer the bill unless the plaintiff specially requires him so to do by the prayer of his bill; but he may appear and answer at his option; and if he does not appear and answer, he shall be bound by all the proceedings in the cause. If the plaintiff shall require him to appear and answer, he shall be entitled to the costs of all the proceedings against him, unless the court shall otherwise direct.

X. Guardian and Prochein Amis.

Infants and others under guardianship now represented.

36. Guardians *ad litem* to defend a suit may be appointed by the court or judge for infants or other persons who are under guardianship, or otherwise incapable to sue for themselves. All infants and other persons so incapable may sue by their guardians, if any, or by their *prochein ami*, subject, however, to such orders as the court may direct for the protection of infants and other persons.

XI. Revivor and Supplemental Bills.

Revival of suit upon death of plaintiff.

37. In all cases where the plaintiffs have died, their legal representatives may, upon motion at any time and upon filing a duly authenticatedcopy of the letters testamentary or ofadministration and notice thereof to the defendant,be made parties,and the cause shall proceed as though the plaintiff had not died, or the defendant may obtain an order reviving the cause by motion and notice thereof to the legal representative of the plaintiff, and filing a certified copy of the letters testamentary or of administration as aforesaid, and the cause shall thereupon stand for such proceeding or order or decree as may be proper.

Revival upon death of defendants.

38. In all cases where the defendant in an equity suit shall have died, the cause may be revived against his legal representative upon motion at any time by the plaintiff and upon his filing a duly certified copy of the letters testamentary or of administration granted to the legal representative of the deceased defendant, and notice of such motion to the legal representative to show cause, if any he can, why the cause should not be revived against him, and thereupon the cause shall proceed in the same manner as if the suit had been instituted against such represent-

ative or the defendant had not died. Or the legal representative of the deceased defendant may himself have an order reviving the cause on his motion, and notice thereof to the plaintiff or his solicitor, and upon his filing a certified copy of his letters testamentary or of administration, and the cause shall thereupon stand as if the death of the defendant had not occurred or his representative had been originally sued.

Supplemental bill or bill in the nature of a supplemental bill.

39. Whenever any suit in equity shall become defective from any event happening after the filing of the bill, (as, for example, by a change of interest in the parties,) or for any other reason a supplemental bill, or a bill in the nature of a supplemental bill, may be necessary to be filed in the cause, leave to file the same may be granted by the judge at any time, upon proper cause shown, and due notice to the other party; and if leave is granted to file such supplemental bill, the defendant shall demur, plead, or answer thereto on the next succeeding rule day after the supplemental bill is filed in the clerk's office, unless some other time shall be assigned by the judge or court.

Answer, plea or demurrer thereto.

Need not set forth statements of the the original bill.

40. It shall not be necessary in any supplemental bill to set forth any of the statements in the original suit, unless the special circumstances of the case may require it.

XII. Amendments of Bills.

When bill may be amended of course.

41. The plaintiff shall be at liberty, as a matter of course, and without payment of costs, to amend his bill in any matters whatever before any copy is taken out of the clerk's office; but if he amend(as he may do of course)after a copy has been so taken before any answer or plea, or demurrer to the bill, he shall pay to the defendant the costs occasioned thereby, and shall without delay furnish him a fair copy of the amendments free of expense, with suitable references to the places where the same are to be inserted. If there be more than one defendant, a copy shall be furnished to each defendant affected thereby.

Where amendment is after copy shall pay costs and furnish copy of amendments.

Amendment after answer, plea or demurrer.

42. After an answer or plea or demurrer is put in, and before replication, the plaintiff may, upon motion or petition, without notice, obtain an order from the court or judge to amend his bill, on or before the next succeeding rule day, upon payment of costs, or without payment of costs, as the court or the judge may, in his discretion, direct. But after replication filed, the plaintiff shall not be permitted to withdraw it and to amend his bill, except upon special order of the judge or court upon motion or petition, after due notice to the other party, and upon proof by affidavit that the same is not made for the purpose of vexation or delay, or that the matter of the proposed amendment is material and could not, with reasonable diligence, have been sooner introduced into the bill, and upon the plaintiff submit-

Amendment of bill after replication and withdrawal.

When such amendment shall be filed.

ting to such other terms as may be imposed by the judge for speeding the cause. In either case the plaintiff shall serve the defendant with a copy of the amendment allowed to be made.

43. If the plaintiff, so obtaining any order to amend his bill after answer or plea or demurrer, or after replication, shall not file his amendments, or amended bill, as the case may require, in the clerk's office on or before the next suceeding rule day, he shall be considered to have abandoned the same, and the cause shall proceed as if no application for any amendment had been made.

XIII. When Answer, Plea or Demurrer shall be filed. Bills taken pro confesso, and Decrees pro confesso.

Plea, demurrer or answer.

When to be filed.

Order taking bills for confessed land decree pro confesso.

Attachment where discovery be sought.

44. It shall be the duty of the defendant, unless the time shall be otherwise enlarged, for cause shown, by the judge or court upon motion for that purpose, to file his plea, demurrer or answer to the bill in the clerk's office on the rule day next succeeding that of entering his appearance; in default thereof the plaintiff may, at his election, enter an order (as of course) in the order book, that the bill be taken *pro confesso;* and thereupon the cause shall be proceeded in *ex parte*, and the matter of the bill may be decreed by the court at any time, if the same can be done without an answer and is proper to be decreed, or the plaintiff, if he requires any discovery or answer to enable him to obtain a proper decree, shall be entitled to the process of attachment against the defendant to compel an answer; and the defendant shall not, when arrested upon such process, be discharged therefrom, unless, upon filing his answer, or otherwise complying with such order as the court or judge may direct as to pleading to, or fully answering the bill, within a period to be fixed by the court or judge, and undertaking to speed the cause.

Decress pro confesso.

How and upon what terms may be opened.

45. When the bill is taken *pro confesso*, the court may proceed to a decree at any time, and such a decree rendered shall be absolute, unless the court shall, within twenty days after rendering the decree, set aside the same, or enlarge the time for filing the answer, upon cause shown upon motion and affidavit of the defendant. And no such motion shall be granted, unless upon the payment of the costs of the plaintiff in the suit up to that time or such part thereof as the court shall deem reasonable, and unless the defendant shall undertake to file his answer within such time as the court shall direct, and submit to such other terms as the court shall direct, for the purpose of speeding the cause.

XIV. Injunctions, Receivers, &c.

Injunctions.

46. That in all cases of applications for injunctions, the judge to whom presented, before granting the same, shall be satisfied that sufficient notice of the application has been given to the par-

ty sought to be enjoined and of the time and place when the motion is to be made, and no order for such injunction shall be granted without such notice, unless it is manifest to such judge, from the sworn allegations in the bill or the affidavit of the complainant or other competent person, that the injury apprehended will be done if an immediate remedy is not afforded, when he may grant instanter an order restraining the party complained of until the hearing or the further order of the court or judge, which restraining order shall have all the force of an injunction until rescinded or modified by the court or judge.

Notice of application for must be given.

Restraining order may be granted in some cases.

47. The provisions of the foregoing rule as to notice shall apply to applications for the appointment of receiver or other extraordinary remedy in equity to the extent they may be applicable. Every receiver shall, within twenty days after his appointment, file in the clerk's office a just and true inventory under oath of the whole real and personal estate coming under his control or to his possession under his order of appointment. The receiver shall, at the expiration of three months from the date of his appointment and every three months thereafter, file in the same office an inventory and account under oath of his trust and of any additional property or effects which he has discovered or which shall have come to his hands since his appointment, and of the amount remaining in his hands or invested by him, and of the manner in which the same is secured or invested, stating the balance due from or to him at the time of rendering his last account,and his receipts and expenditures since that time, in the form of debtor and creditor. Whenever a receiver shall neglect to file the inventory and account above required,the court shall direct a special order to be entered requiring the receiver within not more than twenty days after service of a copy of such order upon him personally, or at his place of residence in case of his absence, to file such inventory and account and to pay out of his own funds the expenses of the order and the proceedings thereon, or that an attachment issue against him, and directing the clerk with whom the order may have been entered, to cause a copy of the same to be served on the delinquent and to certify his default to the court, if the terms of the order be not complied with. The court may grant leave to put the bond or recognizance of the receiver in suit against the sureties without notice to the sureties of the application for such leave.

Receivers.

Notice of application for must be given.

Inventories of property to the filed.

Accounts to be filed every three months.

Penalty in case of failure.

Bond, how put in suit.

XV. Demurrers and Pleas.

48. No demurrer or plea shall be allowed to be filed to any bill unless upon a certificate of counsel that in his opinion it is well founded in point of law, and supported by the affidavit of the defendant, or in case of his absence from the State, of his agent or attorney, that it is not interposed for delay; and if a plea, that it is true in point of fact.

Certificate and affidavit to plea or demurrer.

Defendant may demur, plead to, or answer different parts of bill. Charge of fraud and combination must be answered by statement of facts.

49. The defendant may, at any time before the bill is taken as confessed, or afterwards with the leave of the court, demur or plead to the whole bill or to part of it, and he may demur to part, plead to part, and answer as to residue; but in every case in which the bill specially charges fraud or combination, a plea to such part must be accompanied with an answer fortifying the plea, and explicitly denying the fraud and combination, and the facts on which the charge is founded.

Setting down demurrer or plea to be argued

50. The plaintiff may set down the demurrer or plea to be argued, or he may take issue on the plea. If upon an issue the facts stated in the plea be determined for the defendant, they shall avail him, as far as in law and equity they ought to avail him.

Proceedings where issue is taken upon plea.

Proceedings where demurrer or plea is overruled.

51. If upon the hearing any demurrer or plea is overruled, the plaintiff shall be entitled to the costs in the cause up to that period, unless the court shall be satisfied that the defendant has good ground in point of law or fact to interpose the same, and it was not interposed vexatiously or for delay. And upon the overruling of any plea or demurrer, the defendant shall be required to answer the bill, or so much thereof as is covered by the plea or demurrer, by the next succeeding rule day, or at such other period as, consistently with justice and the rights of the defendant, the same can in the judgment of the court be reasonably done; in default whereof, the bill shall be taken against him *pro confesso*, and the matter thereof proceeded in and decreed accordingly.

Proceedings where demurrer or plea is allowed.

52. If, upon the hearing, any demurrer or plea shall be allowed, the defendant shall be entitled to his costs. But the court may in its discretion, upon motion of the plaintiff, allow him to amend his bill upon such terms as it shall deem reasonable.

Demurrer or plea.

53. No demurrer or plea shall be held bad and overruled upon argument only because such demurrer or plea shall not cover so much of the bill as it might by law have extended to.

Demurrer or plea.

54. No demurrer or plea shall be held bad and overruled upon argument only because the answer of the defendant may extend to some part of the same matter as may be covered by such demurrer or plea.

Cause shall be dismissed upon failure of plaintiff to reply to plea or demurrer &c.

55. If the plaintiff shall not reply to any plea, or set down any plea or demurrer for argument, on the rule day, when the same is filed, or by the next succeeding rule day, he shall be deemed to admit the truth and sufficiency thereof, and his bill shall be dismissed as of course, unless the court or judge shall allow him further time for the purpose.

XVI. Answers.

56. When the same solicitor is employed for two or more defendants, and separate answers shall be filed, or other proceed-

ings had by two or more of the defendants separately, costs shall not be allowed for such separate answers or other proceedings unless a master, upon reference to him, shall certify that such separate answers and other proceedings were necessary or proper, and ought not to have been joined together.

Where two defendants employ the same solicitor, costs shall not be allowed for separate answers.

57. The rule that if a defendant submits to answer, he shall answer fully to all the matters of the bill, shall no longer apply in cases where he might by plea protect himself from such answer and discovery. And the defendant shall be entitled in all cases by answer to insist upon all matters of defence (not being matters of abatement, or to the character of the parties, or matters of form,) in bar of, or to the merits of the bill, of which he may be entitled to avail himself by a plea in bar; and in such answer he shall not be compellable to answer any other matters than he would be compellable to answer and discover upon filing a plea in bar, and an answer in support of such plea, touching the matters set forth in the bill, to avoid or repel the bar or defence. Thus, for example, a bona fide purchaser for a valuable consideration, without notice, may set up that defence by way of answer instead of plea, and shall be entitled to the same protection and shall not be compellable to make any further answer or discovery of his title than he would be in any answer in support of such plea.

General structure of answer.

58. A defendant shall be at liberty by answer to decline answering any interrogatory or part of an interrogatory from answering which he might have protected himself by demurrer; and he shall be at liberty so to decline, notwithstanding he shall answer other parts of the bill from which he might have protected himself by demurrer.

May decline answering interrogatory where he might have demurred.

59. In every case where an amendment shall be made after answer filed, the defendant shall put in a new or supplemental answer on or before the next succeeding rule day after that on which the amendment or amended bill is filed, unless the time therefor is enlarged or otherwise ordered by the judge or court, and upon his default the like proceedings may be had as in cases of an omission to put in an answer.

Supplemental answer upon amendment of bill.

60. Every defendant may swear to his or her answer before any Judge or Justice of a Court of the United States, or Judge or Justice of any Court of any State or Territory of the United States, or before any Justice of the Peace or Notary Public of any of the said States or Territories, or of this State.

How answer may be sworn to.

XVII. Amendment of Answers.

61. After an answer is put in, it may be amended as of course in any matter of form, or by filling up a blank, or correcting a date, or reference to a document or other small matter, and be re-sworn, at any time before a replication is put in, or the cause is set down for a hearing upon bill and answer. But after repli-

Amendment of course before replication

After replication how made.

cation, or such setting down for a hearing, it shall not be amended in any material matters, or by adding new facts or defences, or qualifying or altering the original statements,except by special leave of the court or judge, upon motion and cause shown after due notice to the adverse party, supported if required by affidavit. And in every case where leave is so granted, the court or judge may in his discretion require that the same be separately engrossed and added as a distinct amendment to the original answer, so as to be distinguishable therefrom.

XVIII. Exceptions to Answers.

When exception to answer may be filed.

62. After an answer is filed on any rule day, the plaintiff shall be allowed until the next succeeding rule day to file in the clerk's office exceptions thereto for insufficiency, and no longer, unless a longer time shall be allowed for the purpose upon cause shown to the court or judge; and if no exception shall be filed thereto within that period, the answer shall be deemed and taken to be sufficient.

Proceedings upon exception to answer.

63. Where exceptions shall be filed to the answer for insufficiency within the period prescribed by these rules, if the defendant shall not submit to the same and file an amended answer on the next succeeding rule day, the plaintiff shall within five days set them down for a hearing before the judge; and shall enter as of course in the order book an order for that purpose. And if he shall not so set down the same for a hearing, the exception shall be deemed abandoned, and the answer shall be deemed sufficient; provided, however, that the court or judge may for good cause shown enlarge the time for filing exceptions, or for answering the same, in his discretion, upon such terms as he may deem reasonable.

Procedings continued.

64. If, at the hearing, the exceptions shall be allowed, the defendant shall be bound to put in a full and complete answer thereto on the next succeeding rule day; otherwise the plaintiff shall, as of course, be entitled to take the bill, so far as the matter of such exceptions is concerned, as confessed, or, at his election, he may have a writ of attachment to compel the defendant to make a better answer to the matter of the exceptions; and the defendant, when he is in custody upon such writ, shall not be discharged therefrom but by an order of the court, or judge, upon his putting in such answer, and complying with such other terms as the judge may direct.

Proceedings continued.

65. If, upon argument, the plaintiff's exceptions to the answer shall be overruled, or the answer shall be adjudged insufficient, the prevailing party shall be entitled to all the costs occasioned thereby, unless otherwise directed by the court or judge at the hearing upon the exceptions.

XIX. Replication and Issue.

66. No special replication to any answer shall be filed. But if any matter alleged in the answer shall make it necessary for the plaintiff to amend his bill, he may have leave to amend the same with or without the payment of costs, as the court or judge may in his discretion direct.

No special replication, but bill may be amended.

67. Whenever the answer of the defendant shall not be excepted to, or shall be adjudged or deemed sufficient, the plaintiff shall file the general replication thereto on or before the next succeeding rule day thereafter; and in all cases where the general replication is filed, the cause shall be deemed to all intents and purposes at issue, without any rejoinder or other pleading on either side. If the plaintiff shall omit or refuse to file such replication within the prescribed period, the defendant shall be entitled to an order as of course for a dismissal of the suit; and the suit shall thereupon stand dismissed, unless the court or judge shall, upon motion for cause shown, allow a replication to be filed *nunc pro tunc*, the plaintiff submitting to speed the cause, and to such other terms as may be directed.

General replication when shall be filed.

If not filed suit may be dismissed.

XX. Production of Papers.

68. The rules in common law proceedings regulating the production and discovery of books, papers and documents, for the purpose of enabling parties to prepare their pleadings, are hereby adopted and declared to be the rules in equity in respect to the same subject-matter. The adoption of this rule, however, shall in no manner diminish or curtail the general power of the court in respect to this general subject.

How books and papers to be produced.

XXI. Testimony, how taken.

69. After the cause is at issue, commissions to take testimony may be taken out jointly by both parties, or severally by either party, upon interrogatories filed by the party taking out the same in the clerk's office, ten days notice thereof being given to the adverse party to file cross interrogatories before the issuing of the commission; and if no cross interrogatories are filed at the expiration of the time, the commission may issue ex parte. In all cases the commissioner or commissioners shall be named by the court or judge. If the parties shall so agree, the testimony may be taken upon oral interrogatories by the parties or their agents, without filing any written interrogatories.

Filing interrogatories and cross interrogatories.

Commissioners how appointed.

70. Testimony may also be taken in the cause, after it is at issue, by deposition, according to the statutes of the State of Florida regulating the subject. (Thomp. Dig. 459, 461.)

Depositions under the statute.

71. Three months, and no more, shall be allowed for the taking

Time for taking testimony.

Publication of testimony.

of testimony after the cause is at issue, unless the judge shall, upon special cause shown by either party, enlarge the time; and no testimony taken after such period shall be allowed to be read in evidence at the hearing. Immediately upon the return of the commissions and depositions containing the testimony into the clerk's office, publication thereof may be ordered in the clerk's office by the judge, upon due notice to the parties, or it may be enlarged as he may deem reasonable under all the circumstances. But by consent of the parties, publication of the testimony may at any time pass in the clerk's office, such consent being in writing, and a copy thereof entered in the order book or endorsed upon the deposition or testimony.

XXII. Testimony de bene esse.

How taken.

72. Testimony *de bene esse* shall be taken in accordance with the statute. (Thomp. Dig. 459.)

XXIII. Form of the last Interrogatory.

Form of last interrogatory.

73. The last interrogatory in the written interrogatories to take testimony may be stated in substance thus: "Do you know, or can you set forth any other matter or thing which may be a benefit or advantage to the parties at issue in this cause, or either of them, or that may be material to the subject of this your examination, or the matters in question in this cause? If yea, set forth the same fully and at large in your answer."

XXIV. Masters in Chancery—Proceedings before them.

Appointment.

Compensation.

74. The Judges of the Circuit Court in their respective circuits may appoint as many Masters in Chancery as they may find necessary, and they may also appoint a master *pro hac vice* in any particular case. The compensation to be allowed to every master in any particular case shall be fixed by the court or judge in its discretion, having regard to the circumstances thereof, except where the fees are prescribed by law. This compensation shall be taxed as part of the costs in the cause in which they have accrued and shall be charged upon and borne by such of the parties in the cause as the court shall direct. When the compensation is allowed by the court, the master shall be entitled to an attachment for the amount against the party who is ordered to pay the same, if upon notice thereof he does not pay it within the time prescribed by the court.

How payment enforced.

Account of personal estate.

Decree for.

75. Every decree for an account of the personal estate of a testator or intestate, shall contain a direction to the master to whom it is referred to take the same, to inquire and state to the court what parts if any of such personal estate are outstanding or undisposed of, unless the court shall otherwise direct.

Proceedings in Master's office

76. Whenever any reference of any matter is made to a master to examine and report thereon, the party at whose instance or for whose benefit the reference is made shall cause the same to be presented to the master for a hearing on or before the next rule day succeeding the time when the reference was made, or within the time limited by the court. If he shall omit to do so, the adverse party shall be at liberty forthwith to cause proceedings to be had before the master, at the cost of the party procuring the reference.

Party obtaining reference shall cause hearing to be had.

Master shall give notice of proceedings.

77. Upon every such reference it shall be the duty of the master, as soon as he reasonably can, after the same is brought before him, to assign a time and place for proceedings in the same, and to give due notice thereof to each of the parties or their solicitors; and if either party shall fail to appear at the time and place appointed, the master shall be at liberty to proceed ex parte, or, in his discretion, to adjourn the examination and proceedings to a future day, giving notice to the absent party or his solicitor of such adjournment; and it shall be the duty of the master to proceed with all reasonable diligence in every such reference, and with the least practicable delay; and either party shall be at liberty to apply to the court or judge for an order to the master to speed the proceedings and to make his report, and to certify to the court or judge the reasons for any delay.

May adjourn or proceed ex parte.

Shall proceed with reasonable diligence.

General powers as to examination of witnesses.

78. The master shall regulate all the proceedings in every hearing before him upon every such reference, and he shall have full authority to examine the parties in the cause upon oath, touching all matters contained in the reference; and also to require the production of all books, papers, writings, vouchers, and other documents applicable thereto; and also to examine on oath, *viva voce* all witnesses produced by the parties before him; and also to direct the mode in which the matters requiring evidence shall be proved before him; and generally to do all other acts, and direct all other inquiries and proceedings in the matter before him which he may deem necessary and proper to the justice and merits thereof and the rights of the parties.

Subpœna for witnesses.

79. Witnesses who live within the county may, upon due notice to the opposite party, be summoned to appear before the commissioner appointed to take testimony, or before a master or examiner appointed in any cause, by subpœna in the usual form, which may be issued by the clerk in blank and filled up by the party praying the same, or by the commissioner, master, or examiner, requiring the attendance of the witnesses at the time and place specified, who shall be allowed for attendance the same compensation as for attendance on court; and if any witnesses shall refuse to appear, or to give evidence, it shall be deemed a contempt of court, which being certified to the clerk's office by the commissioner, master, or examiner, an attachment may issue thereupon by order of the court or judge, in the same manner as if the contempt were for not attending, or for refusing to give

Attachment for contemp

testimony in the court. But nothing herein contained shall prevent the examination of witnesses *viva voce*, when produced in open court, if the court shall in its discretion deem it advisable.

Manner of accounting before master.

80. All parties accounting before a master shall bring in their respective accounts in the form of debtor and creditor, and any of the other parties who shall not be satisfied with the accounts so brought in shall be at liberty to examine the accounting party *viva voce*, or upon interrogatories, in the master's office, or by deposition, as the master shall direct.

Papers used before court may be used before master.

81. All affidavits, depositions and documents which have been previously made, read or used in the court, upon any proceeding in any cause or matter, may be used before the master.

Examination of claimants or creditors.

82. The master shall be at liberty to examine any creditor or other person coming in to claim before him, either upon written interrogatories, or *viva voce*, or in both modes, as the nature of the case may appear to him to require. The evidence upon all examinations shall be taken down by the master, or by some other person by his order, and in his presence, and shall be filed with his report.

Report.

83. In the reports made by the master to the court no part of any statement of facts, charge, affidavit, deposition, examination or answer brought in or used before him, shall be stated or recited. But such statement of facts, charge, affidavit, deposition, examination or answer shall be identified, specified and referred to, so as to inform the court what statement of facts, charge, affidavit, deposition, examination or answer were so brought in or used.

XXV. Exceptions to Report of Master.

Exceptions. When to be filed.

84. The master, as soon as his report is ready, shall return the same into the clerk's office, and the day of return shall be entered by the clerk in the order book. The parties shall have one month from the time of filing the report to file exceptions thereto; and if no exceptions are within that period filed by either party, the report shall stand confirmed on the next rule day after the month is expired, if not sooner confirmed by special order of the judge or court. If exceptions are filed, they shall stand for hearing before the court upon reasonable notice by either party. And in order to prevent exceptions to reports from being filed for frivolous causes, or for mere delay, the party whose exceptions are overruled shall, for every exception overruled, pay costs to the other party, and for every exception allowed, shall be entitled to costs—the costs to be fixed in each case by the court or judge.

When shall be heard.

Costs of overruled exceptions.

XXVI. Setting Cause down for Hearing.

At what time cause may be heard.

85. After the cause is at issue and the time for taking testimony has elapsed, either party may, at any time, set the cause down

for a hearing, unless further time for taking testimony is agreed upon by the parties or is allowed by the court or judge, and after the testimony has been taken the cause may be set down for a hearing by either party as aforesaid, provided that the plaintiff or complainant may, as of course, set down the cause for a hearing on bill and answer at any time.

Entry setting down cause for hearing.

86. A cause may be set down for a hearing by an entry in the order book in the clerk's office as follows: "Set down for a hearing by complainant," [*or* defendant, *as the case may be.*] But after the same is so set down, the court or judge may, for good cause, open the same to allow further time for taking testimony. After a cause has been set down for a hearing, either party may, at any time, upon notice to the adverse party, have the cause heard upon a day to be named in such notice, unless for good cause the court or judge shall postpone the hearing to another day, and if on the day named in the notice or the day fixed by the judge for a hearing, one or the other of the parties shall not attend, the cause may nevertheless be proceeded in, and the court shall render such decree as the right and justice of the case may require.

How cause may be heard.

XXVII. Decrees.

When may be signed and recorded. What errors may be corrected without rehearing.

87. Decrees may be signed when pronounced, and may be recorded at once. Clerical mistakes in decrees, or decretal orders, or errors arising from any accidental slip or omission, may, at any time before an actual entry thereof, be corrected by order of the court or judge upon petition, without the form or expense of a rehearing.

Form of decrees and orders.

88. In drawing up decrees and orders, neither the bill, nor answer, nor other pleadings, nor any part thereof, nor the report of any master, nor any other prior proceeding shall be recited or stated in the decree or order; but the decree and order shall begin in substance as follows: "This cause came on to be heard (or to be further heard, as the case may be,) and was argued by counsel; and thereupon, upon consideration thereof, it was ordered, adjudged and decreed as follows, viz:"

(Here insert the decree or order.)

Decree for amount over and above proceeds of sale of mortgaged property.

89. In suits in equity for the foreclosure of mortgages, a decree may be rendered for any balance that may be found due to the plaintiff over and above the proceeds of the sale or sales, and execution may issue for the collection of the same as is prescribed in the rule regulating the equity practice where the decree is solely for the payment of money.

XXVIII. Petition for Rehearing.

When to be filed and form of.

90. Every petition for a rehearing shall contain the special matter or cause on which such rehearing is applied for, shall be signed

by counsel, and the facts therein stated, if not apparent on the record, shall be verified by the oath of the party, or by some other person. No rehearing shall be granted unless the petition is filed within thirty days after granting of the decree, if an appeal lies to the Supreme Court. But if no appeal lies, the petition may be admitted at any time within six months, in the discretion of the court.

Other rules may be made by Circuit Court.

91. The Circuit Courts may make any other and further rules and regulations for the practice, proceeding and process, mesne and final, in their respective districts, not inconsistent with the rules hereby prescribed, in their discretion, and from time to time alter and amend the same.

Affirmation in lieu of oath.

92. Whenever, under these rules, an oath is or may be required to be taken, the party may, if conscientiously scrupulous of taking an oath, in lieu thereof make solemn affirmation to the truth of the facts stated by him, and the same may be taken before any officer or person authorized by law to administer oaths.

XXIX. Transcripts and Returns upon Appeal. Citation.

Transcripts and returns upon appeal.

93. In preparing copies of proceedings and transcripts of records in chancery causes, the form adopted for transcripts of records and proceedings in common law causes, (see Rule 103 in common law actions) shall be followed so far as applicable. Where the testimony is taken upon written interrogatories and answers thereto, each interrogatory and its corresponding answer shall be inserted consecutively as provided by the rule regulating the subject in common law actions (see Rule 99); and it shall not be necessary to insert any other paper connected with such examination, except in the cases provided in said rule.

Authentication of evidence used or rejected upon hearing.

94. No paper, document or instrument of writing shall be copied by the clerk into the record of a chancery cause as used in evidence upon the hearing of said cause, unless the same shall have been noted by the judge as read in evidence, or rejected when offered as evidence.

Citiation upon appeal.

95. When an appeal is entered in the Circuit Court in a chancery cause, the appellant, at the time of entering the appeal, shall apply to the Clerk of the Circuit Court from which the appeal is taken, or upon the filing of the transcript of the proceedings in the Supreme Court, shall apply to the clerk of that court to issue a citation requiring the appellee or respondent to be and appear at the term of the Supreme Court to which the appeal is returnable to show cause, if any he can, why the judgment should not be reversed. Such citation shall be served and returned as a writ of *scire facias ad audiendum errores* upon a writ of error sued out.

RULES OF PRACTICE

FOR THE GOVERNMENT OF

THE COUNTY COURTS.

County Courts.

Summons.

Rule 1. The summons and other writs issued from the County Courts in virtue of their jurisdiction in actions at law, shall conform to those used in the Circuit Court, except as otherwise provided by law or by these rules.

Process, style of, when returnable.

Alias.

2. All writs and process issued upon the commencement of an action in the county court shall run in the name of "The State of Florida," shall be dated the day they are issued, shall be tested in the name of the clerk, and shall be made returnable to the first Monday of the next succeeding month, or of the next month thereafter, as the plaintiff, in his praecipe, may direct. If the writ shall not be duly served before the return day, the plaintiff may have an *alias* writ.

Declaration.

3. The plaintiff shall file his declaration on or before the return day named in the writ, unless the judge shall, for cause, allow further time upon such terms as may be deemed just.

Trial terms.

Defendant's pleading. When to be filed.

4. Each term of the county court as fixed by law is a "trial term;" and each defendant served shall cause his plea or demurrer to be filed on or before the first day of the trial term which shall occur next after the return day of the writ by which suit is commenced, unless further time shall be allowed by the judge for cause shown; and all issue shall be made up before trial.

Judgments by default.

5. If any defendant shall not plead or demur to the declaration within the time required by these rules, or by the day otherwise fixed by the judge, his default may be entered, and the plaintiff may cause final judgment to be entered in the cases and in the manner provided for entering judgments upon default in the Circuit Court, and with like effect. No judgment for default in entering an appearance at the return day of the writ or summons, shall be entered in the county court.

Rules of pleading in Circuit Court shall be rules in County Court.

6. The rules of pleading and practice and of evidence, and the laws of this State prescribing rules of pleading, practice and proceedings, and the service and return of process for the Circuit Courts, shall be, except as herein otherwise provided, or as oth-

erwise provided by law, and so far as they are applicable, the rules of pleading, practice and proceeding in the county courts. (Laws of 1868, Chapter 1627, Section 4.)

Appeals.

7. An appeal from a judgment rendered in the county court in a civil action to the Circuit Court, where the amount in controversy exceeds one hundred dollars, may be taken in the same manner, within the same time and with like effect as is prescribed by law for taking appeals from judgment of the Circuit Court to the Supreme Court. The cause shall be heard by the Circuit Court upon the record and proceedings of the county court in the same manner and subject to the like proceedings, including exceptions, conforming as far as practicable to the mode of reviewing judgments of the Circuit Court by the Supreme Court; and upon such appeal the Circuit Court may affirm or reverse such judgment in whole or in part, and may order a new trial in the county court and render judgment for the cost of the appeal. The judgment of the Circuit Court upon appeal shall be certified to the county court, and the county court shall proceed in the cause according to the directions and judgment of the Circuit Court, and according to law.

Probate and criminal jurisdiction and special proceedings.

8. These rules are not intended to apply to proceedings in the county court in cases of "Forcible Entry and Detainer," to like proceedings, or to matters pertaining to its Probate jurisdiction, or to criminal cases, such proceedings being otherwise specially provided for by law.

Order of the Supreme Court,

Adopting the foregoing Rules of Practice.

SUPREME COURT OF FLORIDA,
April Term, 1873.

Pursuant to the provisions of an act of the Legislature, approved February 24, A. D. 1873, and published as Chapter 1938 of the Laws of 1873, it is ordered as follows:

1. The foregoing rules entitled "Rules of Practice for the government of the Supreme Court of Florida," and numbered from one to twenty-five inclusive, shall be the rules of practice in said Supreme Court in all proceedings upon appeal or otherwise in suits instituted or commenced in the Circuit Courts on or after the first day of June, A. D. 1873, and in all original proceedings instituted in said Supreme Court on or after that day.

2. The foregoing rules of practice entitled "Rules of Practice for the government of the Circuit Courts in Common Law Actions," and numbered from one to one hundred and three inclusive, shall be the rules of practice in such actions instituted or commenced in said Circuit Courts on or after the first day of June, A. D. one thousand eight hundred and seventy-three.

The foregoing rules of practice entitled "Rules of Practice for the government of the Circuit Courts in suits in Equity," and number from one to ninety-five inclusive, shall be the rules of practice in such suits instituted or commenced in said courts on or after the first day of June, A. D. one thousand eight hundred and seventy-three.

4. The foregoing rules of practice entitled "Rules of Practice for the government of the County Courts," and numbered from one to eight inclusive, shall be the rules of practice in such suits instituted or commenced in said courts on or after the first day of June, A. D. one thousand eight hundred and seventy-three.

5. All suits or proceedings commenced before the first day of June, A. D. one thousand eight hundred and seventy-three, in the Circuit or County Courts, shall be prosecuted according to the provisions of the act approved February 19th, 1870, and the several acts amendatory thereof which were in force before the said first day of June, commonly known as the "Code of Procedure," and the rules of said courts then in force. All appeals

from judgments or proceedings in suits prosecuted under the "Code" shall be controlled and regulated by its provisions in the Circuit as well as in the Supreme Court, and the rules of the Supreme and Circuit Courts in reference to appeals under the "Code" shall be applicable thereto. Appeals from the County Courts to the Circuit Courts in actions commenced in the County Courts under the Code, shall be prosecuted according to the provisions of the Code and the rules applicable thereto.

6. It is further ordered that the rules hereinbefore mentioned, regulating the practice on and after the first day of June, A. D. 1873, and these orders, be published in the fourteenth volume of the Reports of this Court, and also that the same be published in two newspapers printed at the seat of government of this State.

I, Lyman B. Foster, Clerk of the Supreme Court of the State of Florida, do hereby certify that the foregoing rules and orders are true copies of the originals as recorded upon the minutes of this Court.

In testimony whereof, I have hereunto set my hand and affixed my seal of office at Tallahassee, this the 26th day [L. S.] of May, A. D. 1873.

LYMAN B. FOSTER,
Clerk Supreme Court of Florida.

DECISIONS

OF THE

Supreme Court of Florida.

JANUARY TERM, 1871.

THE STATE *ex rel.* EDMUND C. WEEKS vs. SAMUEL T. DAY.

1. A vacancy in the office of Lieutenant-Governor can be filled by a special election.

2. The appointment of a person to fill a vacancy in the office of Lieutenant-Governor entitles the person to hold the office until the same be filled by an election as provided by law.

3. The allegation of the respondent, that he was "duly elected," insufficient: facts must be averred, showing that he was elected in manner prescribed by law.

Information in the nature of *quo warranto*.

The opinion of the Court presents the points in this case.

J. P. C. Emmons for Relator.

In the argument in behalf of the relator in this case, no authorities are cited save as to the second and third causes of demurrer, to-wit:

That the proclamation sets forth no fact. It does not aver a vacancy. It is contingent. That it should contain that fact as to vacancy see 14th Cal., 187.

As to the *third* cause of demurrer, that it is not averred that the 8th day of November, 1870, was the time fixed by law for holding an election for Lieut.-Governor.

15th Cal., 58, is cited to show that the plea fails in establishing any right to hold said election, and therefore is calculated to force the relator to an issue unnecessary and expensive. 1 Kan., 25-6-7; 2 Kan., 54-5.

The other causes of demurrer rest upon the face of the pleading.

Geo. P. Raney, for Respondent.

There are nine specifications of demurrer.

As to 1st—this is to be discussed in two aspects—

1. Does the plea set out a proclamation?

2. Did that proclamation authorize the holding of an election for Lieut.-Governor? This depends upon the simple question, whether a proclamation calling an election to fill a vacancy in the office of Lieut.-Governor is tantamount to one calling an election for a Lieut.-Governor. Con. 1868, Art. V., Sec. 15; Proc. of Aug. 3, 1870.

As to 2d—the proclamation is not uncertain as to the election, but only as to whether a vacancy will occur. The proclamation itself shows that the idea that there would be a vacancy is founded upon the action of the highest judicial tribunal in the State. It merely intimates a doubt of the Executive as to a vacancy occurring at the expiration; but there is not a doubt intimated in it as to the expiration of the commission, and certainly none as to the election being held. See Proc. Aug. 3, 1870.

As to 3d—it is not necessary to plead matter of law. That said proclamation and election was authorized see 1st Cal. R., 535; Acts 1868, p. 2, Sec. 3, par. 3-4; 1st Cal. R., 502; State of Florida *ex rel.* Weeks vs. Gamble. The plea states that the 8th of November, 1870, was fixed for the election. The above authorities show there was law for it.

As to 4th—the allegation is issuable. What constitutes an election is matter of proof. To deny that respondent was elected would put him to proof. To prove election we

would have to show by proper evidence that we secured a majority of the votes cast. In an action of this kind the defendant must set out and show that he has a good title. This being an elective office, an election is one of the constituent elements of this title. The respondent sets out as his title, elected under a proclamation, the vacancy, qualification and oath of office.

As to 5th and 6th—the certificates mentioned are mere means of proof or evidences of election, and it is not necessary to plead matter of evidence. Acts of 1868, p. 8-29; 4 Wisconsin.

As to 7th—this assumes again it is necessary to plead matter of law. We allege that the election was called and held. If the election was illegal, the relator can test this by demurrer.

8th and 9th—frivolous and special.

A. L. Woodward, Sr., on the same side.

Propositions on Demurrer.

1. An information in the nature of *quo warranto*, is a pleading which must be answered or demurred to, and the general rules of pleading are applicable therein. The State vs. Steers, 44 Miss., 225-26.

2. The only pleadings in *quo warranto* are the complaint and answer. Upon these the issue is fully made up, so far as the pleadings are concerned, and, the action not admitting of a counter claim, no replication is allowed. Atty. Gen. *ex rel.* vs. Messmore, 14 Wis., 115.

3. It is sufficient in the complaint to allege generally that at an election on a day specified, in the several towns and election districts of a certain county, the relator was duly elected and chosen by the legal and qualified voters of the said county to the office "claimed" by him, nor is it necessary to state how many votes were given at the election for each candidate, so as to show that the relator received the

highest number. Dickson vs. Brenner, 20 Wis., 62. It is respectfully submitted whether this authority is not equally applicable to the case at bar in support of the plea.

4. An information in the nature of *quo warranto* is essentially a civil proceeding. The burden of proof is on *the relator,* and every reasonable intendment is to be made in favor of the regularity of the proceedings by which the respondent was put in office. The State *ex rel.* vs. John Kessferle, 44 Miss., 154-57-58-59.

5. The defendant, being in possession, will be presumed to hold *rightfully,* and the plaintiff must first prove the charges contained in the information. State vs. Hinton, 28 Vt., 294; State vs. Brown *et al.,* 34 Miss., 68; The People vs. Lacoste, 37 N. Y., 193.

6. The Governor's proclamation ordering a special election for Lieutenant-Governor, at the periodical general election for members of the Senate and Assembly as contemplated by the Constitution and the election laws of 1868, was in conformity to both, and neither uncertain, ambiguous nor vague in its terms, but as certain, positive, definite and explicit as the peculiar circumstances permitted or the character of the subject-matter required, and in accordance with the opinion of this Court in *mandamus* of Weeks vs. Gamble, Comptroller, May Term, 1870.

7. The averment of *title by election* is not a conclusion of law, taken in connection with the specific allegation of the fact of the election having been held in conformity to the Governor's proclamation.

8. The sufficiency of the certificate of the Secretary of State is respectfully submitted as showing the majority of votes cast at the election for Lieutenant-Governor to have been given to the respondent, with presenting also, *in totidem verbis,* the number of votes cast for a *competing candidate.* The certificate of respondent's majority is *sufficiently issuable* without a statement as to the number of votes cast for

his opponent. The parts, though of unequal proportions, still compose the whole.

Propositions on the Merits or Relative Strength of Title.

1. The constitutent departments of government must be organized as the organic law ordains—in accordance with its spirit and in conformity to its principles.

2. Any departure from manner and form which the Constitution prescribes for the organization of either of the departments, elective or appointed, is in derogation of its authority and a usurpation of power.

3. An office originally *elective* cannot become ***subject to appointment,*** unless upon some contingency contemplated in the Constitution, and then only until the proceeding to fill it by *election* can be ordered and effected, as the Constitution authorizes and the law provides.

4. The Governor's appointee as Lieutenant-Governor, under Section 7, Article V., to fill *a vacancy* in an office elective under the Constitution, can hold it only until an election can be held to fill it as authorized by this section, and provided by the laws regulating elections. Acts 1868, p. 1, sec. 2, sub-division 4, and pp. 33 and 34, sec.—

5. The words "next election," in the section of the Constitution cited, must be held, by just construction, to relate either to the *next periodical election* for Governor, or to the *next general election for members of the General Assembly,* should such an election *previously intervene, in* which *latter event* it is a *special election* to fill the *vacancy* occurring in the office.

6. Where discretionary power is conferred upon any public functionary by the Constitution or laws, it is not an *arbitrary* discretion—*sic volo, sic jubeo*—which is authorized, but such as may be exercised according to the subject-matter to which it relates and the objection contemplated, in accordance with the spirit and principles of the constitution and laws.

7. Hence it follows that the Governor ought, by just intendment and implication, to have ordered a *special election* to fill the vacancy in the office of Lieutenant-Governor as soon as it occurred, in conformity to the true meaning and intent of the existing laws.

8. It is respectfully submitted whether it be competent to the Legislature to confer discretionary power upon the Governor, in relation to *special elections to fill vacancies,* it being the province and duty of the Legislature itself to enact such laws, as contemplated and authorized by the Constitution; and whether so much of the acts as authorize such discretion be not *repugnant* to the Constitution and therefore *void.*

9. It is therefore respectfully submitted whether, the discretionary power exercised by the Governor (under the acts of August, 1868, regulating elections,) being unauthorized by the Constitution, the relator has any title to the office which he claims.

Finally. Whether these be or be not admitted as correct deductions, nevertheless, an election for Lieutenant-Governor having been held as the Constitution ordains and the election laws of 1868 require, and the respondent having entered upon the office, the relator is not *functus officio,* and has no *locus standi* in Court.

Authorities.—Smith's Com. Constitutional Construction, secs. 439-40-41, and secs. 532, 48, and p. 834; opinion of the seven judges, 7 Mass,; 5 How., (Miss.,) 582, 600-6; 9Cal., 198, 202; 6 Cal., 26, 28, 29; 10 Cal., 38, 45, 46; 14 Cal., 180-87-88; 37 Cal., 621-23-24.

RANDALL, C. J., delivered the opinion of the Court.

The relator alleges that on the 24th day of January, 1870, a vacancy existed in the office of Lieutenant-Governor of this State, and that he was duly appointed and commissioned by the Governor to fill such vacancy under and by virtue of

the power and authority in said Governor vested by Section 7 of Article V. of the Constitution, and that on that day he took and filed his oath of office as Lieutenant-Governor, in the office of the Secretary of State, and accepted the office and became by virtue of said Section 7 the Lieutenant-Governor of said State, and that he still is and will continue lawfully to be the Lieutenant-Governor until the first Tuesday in January, 1873; and that the respondent, Samuel T. Day, has usurped said office, &c.

The respondent answers that on the 30th day of August, 1870, the Governor of this State issued his proclamation, giving notice that on the 8th day of November then next, an election would be held by the electors of this State to fill the vacancy which might occur in said office at the expiration of the commission of Edmund C. Weeks, the relator, and that on said 8th day of November, it being the day of a general election throughout the State, an election was held by said electors, and the "respondent was duly and legally elected Lieutenant-Governor" to fill the vacancy, &c., and that he had taken and filed the oath of office, and has since then performed the duties of the office, and is entitled to hold said office and enjoy the emoluments thereof until the year 1873. To this answer the relator demurs, and assigns for causes of demurrer:

That the answer does not show that an election was legally held, or could be held at the time alleged;

That the proclamation of the Governor is too uncertain, irregular and defective to authorize an election;

That the answer does not show by proper averments that the respondent was elected or had title to the office.

It is claimed that the proclamation of the Governor is uncertain, irregular and defective in its terms to authorize the holding of the alleged election. We think, however, upon examination of the proclamation, that if an election was legally authorized to be held at the time alleged, the

proclamation is sufficiently formal and explicit. It gives notice that an election would be held on the 8th day of November, 1870, "to fill the vacancy which might occur in the office of Lieutenant-Governor of said State at the expiration of the commission of Edmund C. Weeks," then Lieutenant-Governor. If there could legally be held, at the time stated, an election to fill said office for the unexpired term, under a proclamation calling a special election, there is nothing in the form or substance of the proclamation which renders an election held on the day and for the office named invalid. The principal ground of demurrer raises the question whether such an election could legally be held to fill the unexpired term of the office while the relator held the office under the appointment and commission of the Governor, by which the vacancy was supplied. It is contended by the relator that the appointment of Mr. Weeks was made solely under the authority of Section 7 of Article V. of the Constitution of this State, which reads as follows: "When any office from any cause shall become vacant, and no mode is provided by this Constitution *or by the laws of the State* for filling the vacancy, the Governor shall have the power to fill such vacancy by granting a commission which shall expire at the next election." And the relator insists that the appointment by the Governor entitles him to hold the office until the same shall be filled by the regular election to be held in 1872.

It will be seen that this section of the Constitution provides for filling of vacancies in office by granting commissions, in the cases where no mode is expressly provided by the Constitution or by law for filling vacancies and if no mode is provided for filling *vacancies,* then the commission shall be in form and effect such as is here provided, but if the laws have made provision, then this section of the Constitution will not control, except as it upholds such provision.

The Legislature, by an act relating to vacancies in office, approved August 6, 1868, has provided that every office shall be deemed vacant by occasion of the death, resignation, removal, judgment of a competent tribunal, &c., and that in all cases in which a vacancy may occur, if the office be a State, district or county office other than a member or officer of the Legislature, it shall be the duty of the Governor to fill such office by an appointment, and the person so appointed shall be entitled to take and hold such office until the same shall be filled by an election as provided by law. The vacancy in the office of Lieutenant-Governor was caused by the operation of the judgment of a competent tribunal, and this vacancy, and the appointment of the relator occurred after the enactment of the law referred to, and the appointment and its tenure must be controlled by that law, which authorized the relator "to take and hold such office until the *same shall be filled by an election* as provided by law." The constitutional provision, as well as the act in question, provide for the filling of a vacancy by a commission or appointment by the Governor, which commission shall expire at the happening of an election. If it had been intended that the appointment by the Governor should supply the office for the residue of the term of the office, there would have been no occasion for using the words which are here used to designate the expiration of the commission; because the time of holding an election to fill the office, at the *expiration of the term*, for the ensuing term, is appointed by the Constitution, and the commencement of the term is there fixed and designated to be in January succeeding the election; whereas the provision for filling vacancies by appointment expressly declares that the commission of the Governor shall expire *at* the "next election" or when the office shall "be filled by an election as provided by law."

If it had been intended that the commission issued by the

Governor should fill the office for the residue of the term, words to that effect would, without doubt, have been employed, instead of words which limit the tenure by an appointment which may expire at an election to be provided by law.

What, then, are the provisions of law for holding elections to fill offices—general and special elections?

The act to provide for the registration of electors and the holding of elections, approved August 6, 1868, Sec. 1, provides, that a general election shall be held on Tuesday succeeding the first Monday of November of each year, in which State and county officers are by law required to be elected. Sec. 2 provides that a Governor and Lieut.-Governor shall be elected every four years; members of the Senate and Assembly, and such county officers as are elective, every two years. Sec. 3 provides for the holding of special elections. The first, second and third clauses of this section provide for filling vacancies which may occur from various causes, in the seat of a representative in Congress, Senators and members of Assembly, and in county offices. The fourth clause provides that special elections may be held "when, in any other case of a vacancy not particularly provided for, the Governor shall in his discretion direct." And the act then proceeds to direct the manner of conducting such elections, and among other things that special elections for any office may be held under the proclamation of the Governor, to be issued not less than fifteen or more than forty days from the day of the publication of the proclamation. The 5th section requires the Secretary of State to issue a notice stating what offices and vacancies are to be filled at each general election in the State, county or district, &c.

The office of Lieut.-Governor is not named in any of the provisions for filling vacancies or for holding special elections, nor are other offices named; but it cannot be questioned that when a provision refers to certain cases, and in

terms refers to "every other" case not particularly provided for, it must include this. The language is quite as comprehensive as that used in the 7th Section of Article V. of the Constitution, which, it is considered, when it refers to "any office," includes that of Lieut.-Governor as among those in which a vacancy may be filled by an appointment.

It is claimed that the office of Lieut.-Governor is not included among those which may be filled by a special election, because the Constitution fixes the time for choosing that officer by election. But so do the Constitution and the statutes appoint the time for the election of all other elective officers; and to say that because the Governor or any other officer may make an appointment to prevent a *hiatus* in an office, this supercedes and legally nullifies the power to provide for an election by the people to fill the office for the residue of an unexpired term, is in effect to declare that the people shall not have the power to choose one to fill an elective office. We cannot conclude that the provisions for holding special elections relate solely to constables, and there being no other offices except that of Lieut.-Governor which can be filled by special elections, it must be deemed that the framers of the Constitution and the Legislature intended to refer to this, and that some semblance of popular representation should be preserved.

The conclusion is, that the appointment of Mr. Weeks to the office of Lieutenant-Governor in January, 1870, entitled him "to take and hold such office until the same" should "be filled by an election as provided by law;" and that if an election was held in November, 1870, in pursuance of a proclamation of the Governor, the term of the relator expired when the office was filled by an election, and that period arrived when it was determined by the canvass that another had been elected. Upon this branch of the demurrer the opinion of the court is against the relator, but upon the question of the sufficiency of the answer as to the title

of the respondent, the allegation that he was "duly elected" is not sufficient. Facts must be averred, showing that he was elected in the manner prescribed by law. Rex vs. Leigh, 4 Burrow, 2,143; State vs. Gleason, 12 Fla., p. 265. Upon this ground the demurrer is sustained with leave to the respondent to amend his answer.

DECISIONS

OF THE

Supreme Court of Florida,

APRIL TERM, 1871.

ROBERT W. BROOME, ADMINISTRATOR OF MATTHEW W. SMITH *et al.*, vs. HORATIO BISBEE, JR.

1. Where a party has a demand, payable under the terms of a contract, out of a particular asset or fund, a Court of Equity will secure the fund and direct the payment of the demand.

2. S agreed to give B one-half of what he, S, might receive from M, if B would assist him in certain work then being performed by S for M. The assistance is rendered, S dies insolvent, and his claim for the service rendered M by himself and B is reduced to judgment. *Held*: That B is entitled to the benefit of the judgment lien, and to payment of one-half of the sum realized from the judgment.

This is an appeal from a final decree in chancery rendered by the Circuit Court for Columbia county. The appeal is prosecuted by the defendants, Robert W. Broome *et al.* The decree directed the payment of five hundred and sixty-five dollars to H. Bisbee, the respondent.

M. Whit Smith being an attorney at law, was employed by William N. Myers to defend him against certain criminal charges then pending before a military commission. Smith associated with him in this defense Horatio Bisbee, Jr., agreeing to pay him one-half of the sums he should receive of Mr. Myers. Bisbee performed his portion of the contract, rendering the service. Smith, during his life-time,

collected small amounts from Myers, and failed and neglected to divide the amounts so collected with Bisbee. Before his death, Smith brought an action against Myers to recover the balance of the compensation due him for the services rendered in the matter stated. After his death, Robert W. Broome qualified as his administrator, continued the suit, and recovered judgment. Smith's estate is admitted to be insolvent. When the final decree was rendered, there was in the hands of a receiver, previously appointed, eleven hundred and thirty-one dollars, which was the proceeds of this judgment. The decree directs the payment of one-half of this sum to the complainant, Bisbee. The administrator of Smith insisting that Bisbee is a general creditor of the estate, and not entitled to share in the particular funds resulting from the judgment, prosecutes this appeal.

Broome and *Niblack* for Appellant.

We submit the following points and principles of law as being correct and applicable to the case at bar:

1: That to constitute a lien upon this particular fund, all the requirements of our statute law must be complied with; that there must be a matter of record in order to give notice, &c. See Thomp. Dig., 183, par. 2.

It cannot be contended that the agreement constituted a limited or special co-partnership, for the bill no where alleges it, and besides there can be no limited or special partnership, unless the requirements of our statute law be complied with. See Thomp. Dig., 230-31.

It is alleged in the bill and admitted in the answer, that Smith's estate is insolvent. Therefore, by our statute law, every claim against an insolvent estate belongs to one of the three classes, to-wit: "prior liens," "preferred debts," or "*pro rata* claims," which must be satisfied in the order named.

2. A prior lien to be effectual must divest the insolvent's *legal estate*. It is contended that this has not been done.

For authority for this principle see 10 Peters, 612; 2 Wheaton, 396. Or it must be *res adjudicata*. See 11 Fla., 111.

The agreement or contract as set out in the bill is not a prior lien, because it does not constitute a mortgage. See Thomp. Dig., 376, 183; 5 Fla., 376; 10 Fla., 133.

The agreement or contract as set out in the bill is not a preferred claim, or debt being omitted from that class, by act of 1853, p. 106, and expressly excluded by act of 1828. Thomp. Dig., 206.

It must be of the order of *"pro rata"* claims.

H. Bisbee, Jr., and *J. J. Finley*, for Respondent.

The facts stated in the bill (and not denied by the answer,) constitute a partnership, or a *community* of interest between complainant and defendant's intestate, and therefore it is a proper case of equity jurisdiction.

Partnership is defined to be the joining together by two or more persons of their money, labor or skill, or either of them, under an understanding that there shall be a communion of profit between them, for the purposes of carrying on a legal trade, business or adventure. 1 Pars. Cont., 124; 3 Kent, 19-20-1-2, (top page); Collyer on Part., 2; Gow on Part., 1; Story on Part., § 2.

This agreement for a community of interest may be expressed or implied from the relation of the parties. 4 Paige, 160; Gow on Part., 9, 5, (marginal); 3 Kent, 25.

In this case, as shown by the bill, the partnership arises from an express agreement, (not denied in answer,) and the labor was performed under it.

Partnership may exist between lawyers as well as between merchants, and may be limited to a single transaction or specified adventure. Gow on Part., 7, citing Marsh vs. Gold; 2 Pick., 286; 1 Wend., 532; 8 Wend., 665; 13 Ark., 173; 15 La. Am., 425; 1 Pars. Cont., 126; Story on Part., § 25; 17 Sergt. & Rawle, 167; 8 Kent, 26.

The answer not denying, but admitting as it does all alle-

gations in the bill, complainant is entitled to relief without further evidence.

The testimony of F. I. Wheaton sustains the allegations in the bill.

The testimony of one witness is sufficient to give the relief, no material allegation in the bill being denied. Vol. III, Greenleaf's Evidence, § 282-84-87-89-90.

Complainant, upon the facts stated in the bill, could not recover against the estate of Smith, as complainant never became Smith's creditor, either by any express or implied promise. Nor can complainant recover from Myers, because Myers never employed complainant, but simply assented that Smith should associate him in his defense *under the agreement stated in the bill.*

There is no other remedy for complainant save the one resorted to, and whether or not the facts constitute a partnership, or simply a joint interest in the fund, the remedy and the right is the same.

Complainant helped to earn the fund and is equitably entitled to his share of it.

The action of defendant and his intestate, in pressing suit to judgment in Smith's name, and refusing to pay complainant, operates as a fraud upon complainant's rights, and the remedy is simply to prevent such a fraud being perpetrated.

WESTCOTT, J., delivered the opinion of the Court.

This appeal is here now for two terms without any petition of appeal filed in this Court showing the grounds upon which a reversal of the decree is sought. We shall therefore simply state the question which arises in the case, and dispose of it. The simple question is whether, under the facts, respondent had an equity which entitled him to a decree for one-half of the sums collected under this judgment, and then in the control of the Court. That at law he might possibly have recovered a judgment for one-half of the amounts collected by Smith in his lifetime, or by his

administrator since his death, may be admitted, and it is no answer to the case made, because as against an administrator, even in ordinary cases where he seeks to enforce no claim against as pecific fund,a creditor can seek either a courtof law or equity. The jurisdiction for this purpose is concurrent. In this case Bisbee seeks to share in this *particular fund,* by virtue of peculiar equities attaching to his demand against the deceased intestate. A court of common law certainly cannot afford this relief, or act upon this particular fund. The sole question is: Does the case made entitle him to share in this particular fund, or does he occupy the standing of a general creditor of this insolvent estate, with no equity entitling him to a portion of this fund, resulting from his contract and the relations of the parties? Being entitled under the terms of the original contract to one-half of the moneys which Smith was to receive from Myers, the defendant in execution, he is clearly entitled, as against his legal representative or others having a beneficial interest in the estate, to the benefit of all liens which Smith may acquire for his security. Smith's claim for services has merged in the judgment, and upon the collection of the judgment Bisbee is clearly entitled to one-half of the specific funds. Smith's contract was not to pay Bisbee a certain amount at all events. It was to pay him one-half of the sums he would realize from Myers, as the services which Bisbee rendered were to enure to the benefit of Myers. After Bisbee has performed one-half, if not more, of the service which these identical funds represent, relying upon the capacity of Myers to pay Smith, and upon the express understanding that he was to share in them in that proportion, it would be palpably inconsistent with the plainest principles of right and justice to make him occupy the relation of a general creditor of an insolvent estate, thus permitting other creditors who had no such equity to take, as against him, a part of this particular fund. The general

creditor who relied upon the general credit of the intestate must look to his general assets. This particular creditor, who has no claim upon the general assets, and who is entitled to no compensation unless something was realized from a debtor to the estate, and in that event to but one-half of the amount, will be given the right in equity to share in that fund without deduction, when the fund can be identified as in this case. If Smith or his estate had never realized anything from Myers, Bisbee could have claimed nothing. Having taken this risk for all purposes of loss, a court of equity, under the particular contract here disclosed, will make it effectual for the purposes of advantage.

That Bisbee has a demand payable out of this particular asset cannot be denied. This is the contract set up and established by proof; indeed the administrator does not deny it. Where a legatee has a right to a particular fund, a court of equity will always secure the interest in his favor when the contest is between legatees, and where the superior rights of creditors do not intervene. In this case the demand is by contract. The particular asset is liable for this particular claim; the general assets are not, except conditionally in the event of an improper appropriation by the intestate. That is the case with the amounts collected by the intestate during his life. Respondent is a general creditor as to that, and there is no claim upon the judgment for that. The fund must be identified. These views are fully sustained by adjudicated cases. 2 Ves. jr., 619; 1 Ves. sr., 282; 1 Mar. Chy. Dec., 64; Story's Eq., 846, 730, 717.

The decree is affirmed.

ROBERT B. S. HARGIS vs. HENRY C. CAMPBELL, SHERIFF AND *ex-officio* ADMINISTRATOR OF LEWIS STARLING, DECEASED.

1. A surviving partner may demand of the administrator of the deceased partner an account of the partnership business. He can also seek a Court of Equity to establish an independent claim against the deceased. Where there are no partnership assets, he may join these two subjects-matter in one bill, as in each case he has an equity which entitles him to an account, and the decree following each equity is the same. The decree in such case simply establishes the debt and directs its settlement in due course of administration.

2. Equity has jurisdiction to reform or cancel instruments obtained through fraud. Where an action at law is instituted upon such an instrument by the administrator of a deceased partner against the surviving partner, and the surviving partner brings a bill to adjust the partnership accounts, and the ascertaining the true character of the instrument is essential to the adjustment of the accounts between the parties, then a Court of Equity will enjoin the proceedings at law. In such case the fraud should be clearly proved before the instrument is reformed.

This is an appeal from the Circuit Court of Escambia county, First Judicial Circuit.

Harry C. Campbell, sheriff of Escambia county, and *ex-officio* administrator of Lewis Starling, deceased, sues Robert B. S. Hargis at law, the foundation of his action being a promissory note of Hargis, payable to Starling.

After the institution of this suit, Hargis files a bill against Campbell as administrator of Starling. The bill sets up—

First. A co-partnership indebtedness of Starling to Hargis.

Second. An individual and separate indebtedness of Starling to Hargis.

Third. Insolvency of Starling's estate.

Fourth. That the note, which is the basis of the suit at law, was obtained fraudulently; that Hargis, when he signed it, supposed it was a receipt for a sum of money paid him by Starling on account of an indebtedness of Starling to him. The bill alleges that Starling came into the co-partnership by a purchase of one-half of a stock in trade owned

by Hargis; that Starling paid him nine hundred dollars on this account, and that when he signed the note, he supposed it was a receipt for this sum. That sometime after the payment of this sum on this account, Starling called on him for a receipt for the amount, to which he, Hargis, readily assented, and, upon Starling's presenting a paper to him to sign, having implicit confidence in his honesty and integrity, without examination he sign it, believing it to be only a receipt for money paid for his one-half interest in the business.

The prayer of the bill is—

First For an injunction to the suit at law.

Second. That the note may be decreed to be delivered up, to be cancelled, or to be reformed, and to be allowed as a credit to Starling against a charge for the value of one-half of the stock sold him at the time of the formation of the partnership.

Third. An account of the partnership, and a decree for the balance due Hargis upon partnership account, and also for the amount due by Starling for professional services as physician, not connected with the partnership.

The defendant demurred to so much of the bill as referred to the suit at law, and answered the residue. The court sustained the demurrer and dismissed the bill.

From this decree this appeal is now prosecuted.

C. C. Yonge and *J. F. McClellan* for Appellant.

It is not sufficient for defendant to show that plaintiff has a remedy at law, but must show that the remedy is *complete* and *adequate.* 4 W. C. C. R., 349; 3 Peters, 210.

Jurisdiction of courts of equity to compel delivery up of and cancellation of arguments, &c., is founded on administration of protective or preventive justice on the principle of *quia timet.* Story's Eq. § 694.

If actual fraud, there is strongest grounds for interference. Ib., and § 695, 700-1; 7 Ves.; ib., 44; 17 ib., 111; 3 ib., 607; 13 ib., 581.

In support of 2d proposition, appellant cites Story's Eq., §663, 683.

This is a case of unsettled partnership account, and where the only remedy at law, if each partner were alive, would be by action of account, which remedy, on account of its *dilatoriness, cumbrousness* and *inconvenience* has become almost obselete. But as one of the partners in the case is dead, the action of account would not be, it being founded in privity between the parties, which privity does not exist between the representative of the deceased partner and the living partner. See Story's Eq., § 663 and 683. Justice Story says: In all matters of partnership, it may be said that, practically speaking, courts of equity exercise an exclusive jurisdicition over the subject.

C. W. Jones for Respondent.

The appellee contends that there is no error in the ruling of the court, and in support of this contends—

1. That the interference of a court of equity to compel the delivery up or cancellation of instrument applies only to cases where there is danger that the same may be negotiated or where there may be apprehension of suits at some remote period when the evidence may be lost, and not to cases already in suit, and where the merits may be tried at law. Story's Eq., § 694.

The exercise is always matter of discretion with the court, and will not be interfered with by the appellate court unless arbitrarily exercised. Story's Eq., § 693 and 742.

2. It does not appear from the bill that there is anything to prevent the complainant from availing himself of any defence he may have at law. Story's Eq. Pl., 373; 9 Wheat., 532; 16 Ohio, 373; 11 Ill., 89; 2 Scam., 532; 4 ib., 312.

A court of chancery will not interfere by injunction or draw to itself a jurisdiction of which the law courts have cognizance, except there be some mistake or fraud which

deprives a party of a defense at law. Story's Eq., 875; 2 Wis., 51.

If the jurisdiction be concurrent, the court first acquiring must retain it.

The plaintiff must be, for the purposes of this argument, confined to the case made by his bill. If his charge of fraud is proven, that is an end of the case, and he asks no further relief, but charges that the estate is utterly insolvent.

If the allegations of fraud be not established, the complainant should not be allowed to resort to any secondary ground of relief. Adams' Eq., 176.

In this view of the case, there is no reason for the consideration of the alleged partnership dealings, which have nothing to do with the merits of the defense; and, further, it does not appear that the partnership account, if any such there be, may not as well be adjusted at law.

Equity takes excluse juridiction of partnership matters only when the proof cannot be had at law; where the remedy of law is adequate, no relief will be given in equity.

WESTCOTT, J., delivered the opinion of the court.

It might be urged that a joinder in this case, of matters growing out of a partnership with other and different matters, such as private accounts between the parties unconnected with the partnership, was an improper joinder of the subject-matter of the suit, and this was our first impression here. Under the peculiar facts of this case, however, such an objection could not be sustained, because for each subject-matter of the suit the plaintiff has a remedy in equity, and the decree following the equities embraced in each subject-matter, is precisely the same, viz: a decree establishing the debt and directing its payment by the legal representative of the deceased intestate in due course of administration. Story's Eq. Pl., 100; 4 John. Ch'y, 619, 630, 843; 3 John. Ch'y, 58; 2 Cox Rep. 44; Cas. Temp. Talb., 217; 3 Atk., 572; 10 Ves. 38; 1 Mylne & Craig, 603, 626.

Was there any partnership stock on hand, it might require a different form of decree for each subject-matter, and perhaps that might be inadmissible, but there is no such stock. The bill alleging that the estate is insolvent, any other decree than the one indicated would be wrong, as plaintiff here, so far as the record discloses, has no lien and is entitled to no priority as against the estate, and he can get none against an insolvent estate by a decree. As to these matters, there is, therefore, abundant equity.

The next and last question necessary to be considered is, is there an equity to enjoin the proceedings at law? As a general rule, where there is a complete defence at law to an action, and there is no allegation of any defect in plaintiff's means of establishing his defence at law, nor any prayer for discovery, a court of equity will not interfere, even to stay trial. There are, however, other and peculiar equities in this case. The account between the parties arising out of the partnership cannot be adjusted until it is determined whether Starling is to be charged with one-half of the goods and credited with a corresponding payment, and that involves a consideration of the true character of the transaction between these parties out of which the note arose, although, strictly speaking, the matter of the purchase may not have been a partnership transaction. It did not necessarily enter into partnership account, as payment for the one-half of the stock may have been necessary to the acquisition of any interest by Starling, and a condition upon which the partnership was to result. In addition to this, a court of equity is alone competent to set aside and cancel this instrument, or to reform it and give effect to it as a receipt. In such cases, when necessary, the suit at law may be enjoined. (3 Hal. Ch'y Rep. 574). Equity exercises a general jurisdiction in cases of fraud, sometimes concurrent, and sometimes exclusive of other courts. The case of a will is about the only exception. (Cooper's Eq. Pl., 125; 2 Ves., 155; Story's Eq., 1841.) The fraud in such a case as this should be

"clearly proved." The decree dismissing the bill was erroneous. The plaintiff is entitled to an injunction upon the usual terms in like cases.

The decree is reversed and the case remanded for further proceedings not inconsistent with this opinion, and conformable to law.

CHARLES R. KING, TAX ASSESSOR AND COLLECTOR, &C., VS. WALTER GWYNN, AGENT, &C.

1. A mere agent of the owner of land cannot maintain in his own name a suit to enjoin the collection of taxes alleged to be illegally imposed upon the land.

2. A bill in equity will not be sustained which seeks to join the collection of a tax on the ground of mere irregularity in the assessment, or the excessiveness of the tax.

3. In the absence of an express provision of the statute as to the mode of ascertaining the valuation of property for purposes of taxation in 1869: *Held*, that it was competent for the Assessor to ascertain and assess the value by the exercise of his own judgment, and a valuation made by the tax-payer did not control.

This is a bill in equity brought by Walter Gwynn, Agent for the Trustees of the P. and G. Railroad Company, against the appellant, tax-collector of the county of Columbia, alleging that complainant represents 17,516½ acres of land in said county belonging to said Trustees. That said lands are not of a greater value than $4,379 12-100. That he returned said lands for taxation as the law directs at that sum for the year 1869. That all the taxes due on said land for said year amounts to $48.16, but that the defendant demands $192.68, as taxes on said land for said year; that last mentioned sum is not assessed according to law, but in direct violation

thereof, as he is prepared to show by proper proofs. That defendant threatens to advertise and sell said lands for the payment of this unjust and illegal demand; and complainant prays an injunction to restrain the defendant from proceeding to advertise or sell said lands.

Upon the filing of the bill, a writ of injunction was granted by the Circuit Judge, without notice to defendant and without giving bond.

The defendant by his counsel moved the court to dissolve the injunction, and this motion was denied, whereupon an appeal was taken.

The appellant assigns the following grounds for reversal of the order:

1. That the injunction was granted without notice.
2. That it was granted without bond.
3. That the plaintiff's remedy is at common law.

Charles R. King for Appellant.

David S. Walker for Appellee.

RANDALL, C. J., delivered the opinion of the court.

The complainant represents himself as the agent of the owners of real estate upon which it is alleged a tax has been illegally assessed for the year 1869. He does not show or pretend that he has any interest whatever in the land, or in the subject-matter in controversy. We are not referred to any rule of law or equity which authorizes a mere agent, having only the care and oversight of real estate, to maintain an action in his own name relating to such property. If taxes have been improperly assessed upon such lands, the owner or some person having an interest therein may have such remedy as the law affords. The injury threatened in this case affects the owner or his creditors, not the agent. For aught that appears, the principal may have assented to the levy of the tax complained of by the agent, but the names

of the parties affected are not mentioned in the bill of complaint.

The person having the legal title must be a party to the suit. If the want of proper or necessary parties is apparent on the face of the bill, the defect may be taken advantage of by demurrer. If the court shall proceed to a decree, the decree may be reversed for error on this account. Story's Eq. Pl., pp. 231 to 236; Cooper's Eq. Pl., 33; 1 Daniel's Ch'y Pr. 180 (3d ed.); Betton vs. Williams, 4 Fla. 11.

It may be appropriate to say nothing further in the present disposition of this cause, but as there seemed to be some difference between counsel in relation to the state of the law regulating the assessment of property for the purposes of taxation, in force at the time of the levy of the taxes for the year 1869, it is not deemed out of place to notice the argument on that point.

Respondent's counsel insists that the assessment and valuation of the lands could not be made under the act of January 15, 1859, Chap. 589, because that act was repealed by Chap. 1345, approved Dec. 8, 1862. This latter act provides that "the County Commissioners of the several counties of this State shall value all property subject to taxation in their respective counties, and assess the taxes thereon as required by law to be done by Tax-Assessors and Collectors" add repeals "all laws and parts of laws conflicting with the provisions of this act."

Upon the passage of this act there was left no mode of assessing the value of property except according to its provisions, and we find that this act was also repealed by Chap. 1,405, approved Dec. 2, 1863, without reviving any pre-existing law or providing any new method of assessment of *valuations,* but it directs the Assessors to assess taxes upon all taxable property thereafter. We next find an act approved January 16, 1866, Chap. 1,501, entitled an act to raise a revenue for the State of Florida. The first section imposes a capitation tax. The second section enumerates

the various kinds of property, real and personal, subject to taxation, and provides that they shall be taxed at an uniform rate upon the value thereof. The third section provides "that the value of assessments on the subjects of taxation and specified in the second section of this act, shall be made in *the manner prescribed by law* for the valuation of property and the assessment of taxes thereon; and the taxes authorized to be levied for county, city and town purposes, shall be assessed and collected in conformity with the principles of equality and uniformity, as prescribed in the State Constitution." The fourth section provides that the subjects of taxation shall be taxed at the rate of one-half of one per centum of the value, and no other State tax.

We have seen that the act of Dec. 8, 1862, providing that County Commissioners should fix the valuation of property to be taxed, repealed all laws conflicting therewith. Then the act of Dec. 2, 1863, repealed that of 1862, without reviving any other law; and we find a law on page 22 of Thomp. Dig., declaring that the repeal of a repealing act does not revive the act first repealed, unless there be express words declaring that purpose. The result is that at the time of the enactment of the act of January 16, 1866, there was no express law in existence prescribing the manner of estimating the value of taxable property.

The respondent insists, however, that the 8th section of the last named law provides a mode of valuation. It reads as follows: "That all *returns of taxable property* shall be sworn to before the Tax-Assessor, or any other officer authorized to administer oaths, or some evidence by the tax-payer making the same, and the Assessor shall certify under oath, upon his assessment book, that this requisition has been complied with in every instance." I do not think this section, either expressly, or by implication, gives a rule for estimating the taxable value of property. It merely provides that the "return of taxable property," in other words, the list of property taxable according to the second section, shall

be sworn to by the person making the list or return. It says nothing about valuation.

There are papers in the record relating to the appointment of a committee of three persons by the County Commissioners for the purpose of revising some of the assessments, according to the provisions of the repealed act of 1859, but we discover no connection between these papers and the case at bar. It may be that this proceeding led to the alleged increased assessment of the property referred to in the complainant's bill, for we find that the Tax Assessor complains to the Commissioner that while some of the lands are given in at five dollars per acre, other lands equally valuable are given in at fifty cents per acre: and we find also that the committee reported that lands of the Trustees of the Pensacola and Georgia Railroad were raised from twenty-five cents to one dollar in valuation.

What action was taken upon this report does not appear, nor does it appear that the lands of the Trustees were valued according to this report in the tax rolls as a basis for the levying of the tax complained of.

If I am correct in the conclusion that the laws specially providing for the valuation of property had been repealed, it may be legitimately implied that the proper officer—to-wit: the Assessor—should ascertain, according to the best means within his reach, the value of property returned for taxation, in order that he may assess and collect the taxes "in conformity with the principles of equity and uniformity as prescribed in the State Constitution," and I do not see how the principles of equality and uniformity could well be observed in the valuation and taxation of property, if each owner of property were allowed to put such value upon it as he saw fit, without reference to the value of his neighbor's property, and perhaps with an eye to avoiding the bearing of his due share of the burthens of government.

The act of 1866 does not authorize the tax-payer to assess the value of his own property, but it does require the As-

sessor to apportion the taxes with reference to "equality and uniformity," and he can do this only by making an estimate of the value of property taxed, and apportioning the taxes accordingly. If the Assessor, in this case, distrusting his own judgment, chose to consult that of the County Commissioners, or a committee of citizens, it should seem to show that he endeavored to do his duty honestly and conscientiously. But in what manner he arrived at the value of the property in question does not appear. That he differed with the Agent of the Trustees of the lands of the Pensacola and Georgia Railroad in his estimate of the value of the lands, with reference to the equality and uniformity of the valuation of the property of others, is not a ground for appealing to a court of equity.

But the bill in this case does not set forth in what particular the Assessor proceeded illegally, and it cannot therefore be determined from the bill that a writ of injunction ought to have been granted.

It is held in Pennsylvania and other States that equity will not interfere if the statute has provided a remedy. Hughes vs. Kline, 30 Penn., 227. If one is excessively taxed and omit the course provided by law for his relief, the Court will not enjoin the collection for the purpose of enabling him to bring an action to settle the legality of the tax. Deane vs. Todd, 22 Miss., 90.

The 4th Section of Chapter 151, Laws of 1847—8, provides an ample and convenient remedy by petition to the Circuit Judge, who will examine the matter and decide upon the lawfulness of the assessment. The Supreme Court of Illinois, in Ottawa vs. Walker, 21 Ill., 610, makes the following distinction as to the cases in which the court of equity may or may not interfere by injunction: "Where a corporation, or an officer, or a body of individuals, are vested with the power to levy a tax for a specific purpose, a court of equity will not enquire into the regularity of the exercise of the power, but leave the parties to their remedy

at law, unless it is exercised for fraudulent purposes. But when the law has conferred no power to levy a tax, or in case a person or an officer not authorized to exercise such a power shall levy a tax, or when the proper persons shall make the levy for purposes on the face of the levy not authorized, or for fraudulent purposes, a court of equity may stay its collection by injunction." A court of equity will not restrain the collection of a tax where the assessment is merely erroneous and not void. Livingston vs. Hollenbeck, 4 Barbour, 9; Van Rensselaer vs. Kidd, ib., 19.

It does not follow that every person whose taxes are rated higher than they should be, or who may be injured by the errors of ministerial or judicial officers in the attempt to perform official duties, may have a remedy by bill in chancery. The jurisdiction of chancery arises from necessity; from the effort and the desire to avoid complex litigation, and from the provisions of legislative enactments conferring jurisdiction; and though a remedy at law may be provided for cases where equitable jurisdiction before obtained without destroying the latter, I do not see that this doctrine affects the case at bar, unless the enactment of a statutory remedy, which did not before exist, is, of itself, a recognition of the prior existence of a remedy in equity. This, of course, will not be pretended.

The injunction must be dissolved and this cause remanded, with directions to dismiss the bill.

GEORGE W. ALLEN, TAX-ASSESSOR, &C., APPELLANT, VS. WALTER GWYNN, AGENT PEN. & GA. R. R., RESPONDENT.

C. R. King for Appellant.

D. S. Walker for Respondent.

WESTCOTT, J., delivered the opinion of the court.

The facts in this case are substantially the same as in the case of King vs. Gwynn, and for the reasons given in that case, the judgment of this court is the same as in that case.

The injunction must be dissolved and the cause remanded, with directions to dismiss the bill of complaint.

DECISIONS

OF THE

Supreme Court of Florida.

OCTOBER TERM, 1871.

GENSLER & SILVERSTEIN vs. FLORIDA RAIL ROAD COMPANY.

Where an appeal, taken under the statute before the Code, was dismissed for want of a bond, a new appeal may be taken under the Code at any time within two years after the entry of the judgment, if the judgment is of such character as authorizes an appeal to be taken from it within two years.

Motion to dismiss the appeal.

The nature of the motion is stated in the opinion of the court.

Finley & Finley for Respondents.

Peeler & Raney and *J. B. Dawkins* for Appellants.

WESTCOTT, J., delivered the opinion of the court.

This is a common law judgment, rendered anterior to the passage of the code. At the time it was rendered the party had the right to prosecute an appeal during the term in which the judgment was rendered, and for ten days thereafter, as well as to prosecute a writ of error within two years from the date of the judgment. At a previous term of this court, an appeal, which was prosecuted under the

statute before the Code, was dismissed for want of a bond. Before the expiration of two years, the right to prosecute a writ of error was destroyed by the passage of the code, which abolished the writ of error, and substituted therefor an appeal, limiting the time for its prosecution to the same period as existed before in the case of a writ of error, viz: two years after the date of the entry of the judgment. The limitation of a writ of error under the statute, anterior to the code, is the same as the limitation for the appeal under the code, and the right of the party under the code now is, in this respect, precisely the same as his right under the old statute. It follows, that if the appellant here could have prosecuted a writ of error under the old statute, in the event it had not been repealed, he can now prosecute an appeal. The question therefore is, did the dismissal of the former appeal in this case, taken under the old statute, destroy his right to prosecute a writ of error? for if it did not, then he has the same right under the substituted remedy of appeal. The appeal and writ of error authorized by the old statute were concurrent remedies. The prosecution of an appeal, as in this case, would not have been a bar to the subsequent prosecution of a writ of error, in the event the appeal was dismissed for an irregularity, such as the want of a sufficient bond, as in this case.

The principle here involved is sustained by a case reported in 8 Peters, 43, where it was held, that after an appeal has been dismissed for want of an appeal bond, a party may have another appeal within five years from the decree, this being the limitation fixed by the Act of Congress. The court in the case of the U. S. vs. Pacheco, 20 How., 262, say, "the Act of Congress authorizes the appeal within five years, and the period allowed by law cannot be shortened by any rule or practice of the court;" and that, "after a case has been docketed, and the appeal dismissed, the party against whom the decree was rendered may still, at any time within five years from the date of the decree, take a new appeal." In

this case, the dismissal of the appeal did not operate to destroy the right to prosecute a writ of error. At the time of the passage of the code this right existed, and its exercise now under the code, through the substituted remedy of appeal, is entirely proper.

The motion is denied.

ZINN, ALDRICH & CO., vs. LOUIS DZIALYNSKI, AND SANDERSON & L'ENGLE vs. LOUIS DZIALYNSKI.

1. Upon an appeal from an order, the return must contain all the papers and records upon which the order was granted.

2. Where the return made is not certified as a record, the Clerk merely certifying that the papers are true copies of the originals, the case will be stricken from the docket.

This is a motion to dismiss an appeal from an order of the Circuit Court for Duval county.

The nature of the motion is stated in the opinion of the court.

H. Bisbee, Jr., for Appellants.

Sanderson & L'Engle for Respondents.

RANDALL, C. J., delivered the opinion of the court.

The order appealed from purports to have been granted upon an inspection of the records of the court in two actions referred to, and the answer of the sheriff as to certain moneys in his hands. The order directed the money to be paid to one of the judgment creditors.

We do not find that the records in the actions referred to,

or certified copies thereof, have been sent to this court. Without them we cannot come to a satisfactory conclusion upon the questions sought to be presented. Section 272 of the Code, and Rule IV. of this Court, requiret hat upon an appeal from an order, the return shall consist of a certified copy of the notice of appeal of the order, and of the papers and records upon which the court granted the order. The order appealed from states distinctly what papers and records were considered by the court, and we are therefore advised that we have not a proper return.

We might have directed a proper return to be made, if the certificate to the paper on file here had been sufficient. It merely certifies that "the foregoing are true copies of the original," &c., and of course does not purport to embrace the necessary papers and records. There is, therefore, nothing upon which to found a *certiorari* to supply the absent records.

The only order we can make under the circumstances is to strike the case from the docket. (See Caulk, adm'r, vs. Fox, 13 Fla., 147.)

Ordered accordingly.

O. M. DORMAN, APPELLANT, VS. S. RITZWALLER, RESPONDENT.

An appeal from the decision of the Circuit Court overruling a demurrer to a replication, other issues in the record being undisposed of, in an action of ejectment, and no final judgment having been rendered: *Held*, That the appeal must be dismissed, as no appeal lies from such decision in an action at law.

Call & *Basnett* for Appellant.

Fleming & *Daniel* for Respondent.

RANDALL, C. J., delivered the opinion of the court.

This is an appeal, in form, from the order or judgment of the Circuit Court of Duval county, sustaining a demurrer to a "replication to defendant's two last pleas." There is a plea standing not disposed of. The action was ejectment. This appeal was entered in June, 1870, and the record does not disclose any final judgment.

This court has always and repeatedly held, that in a suit at law no appeal would lie except from a final judgment. This appeal must therefore be dismissed.

Ordered accordingly.

EMMA L. NELSON, PLAINTIFF IN ERROR, VS. DANIEL B. MCLAURIN, DEFENDANT IN ERROR.

Where there is a demurrer to the pleadings in the record, and not disposed of by the Court, and not waived or abandoned by new pleadings or otherwise by the party demurring, it is error to submit a cause to a jury.

Error to the Circuit Court for Suwannee county.

Sanderson & L'Engle for Plaintiff in Error.

J. B. Dawkins for Defendant in Error.

RANDALL, C. J., delivered the opinion of the court.

The plaintiff in error sued defendant in debt upon a money bond. The defendant demurred to the declaration for special causes, and on the same day filed special pleas.

The plaintiff demurred to the special pleas. Defendant afterwards filed additional special pleas, to which the plain-

tiff demurred. Afterwards, as appears by the record, the cause was submitted to a jury who found for the defendant and judgment was rendered by the court against the plaintiff for costs.

The record of the judgment does not show that the plaintiff was present in person or by attorney, at the time the cause was tried before the jury, but on the contrary, it is apparent from the proceedings had subsequently that the plaintiff was not represented.

It does not appear that the several issues of law raised by the several demurrers or either of them were disposed of by the court, and we cannot discover that any issue of fact was joined subsequent to the demurrers. The cause was, therefore, not at issue upon the facts, and the issues of law only were before the court.

The Circuit Court erred in not disposing of the demurrers before swearing a jury to try the issues, if any there were, in order that if the demurrers had been deemed insufficient, an issue might have been made up upon the matters pleaded. (2 Mumford, 518; 6 Fla., 376.) And besides, if the plaintiff did not appear at the time the cause was reached, it was improper to submit the case to a jury, (even if an issue of fact was joined which might be tried by a jury,) in the absence of the plaintiff or his attorney and in the absence of his proofs, and thus obtain a verdict and enter a judgment which might be a bar to a future suit. In such case the defendant should have moved for a non-suit or dismissal of the suit.

The judgment of the Circuit Court is reversed with costs.

DECISIONS

OF THE

Supreme Court of Florida,

JANUARY TERM, 1872.

WILLIAM WILSON, RESPONDENT, VS. FRANKLIN DIBBLE, APPELLANT.

A new trial should not be granted as against the weight of evidence, unless the preponderance is such as to warrant the opinion that the verdict was produced by improper influences; and particularly where two juries have rendered the same verdict upon the same state of facts.

Appeal from the Circuit Court, Fourth Judicial Circuit, Duval county.

Wilson sued Dibble and complained that defendant was indebted to him for cedar logs sold and delivered, for which defendant agreed to pay him fifty cents per cubit foot at Florida measure, or sixty cents per foot at New York measurement. That there were delivered 4,262 1-6 feet, New York measurement, at 60 cents per foot, amounting to $2,557.30. Plea, payment before suit.

The cause was tried in November, 1869, and a verdict rendered for plaintiff for $444.62.

Upon defendant's motion a new trial was granted upon the ground that the verdict was against the evidence and against the weight of evidence. In June, 1871, another trial was had, and upon substantially the same testimony, a verdict was rendered for plaintiff for five hundred dollars and eight cents.

A motion was then made for a new trial on the grounds that the verdict was against the weight of evidence. This motion was denied, and judgment entered upon the verdict, whereupon defendant excepted and appealed from the judgment.

The testimony shows that the cedar was taken by defendant in the absence of plaintiff and shipped to New York by defendant, and was not measured before shipment.

Defendant made up an account of the cedar at New York measurement, and estimated the amount at fifty cents per cubic foot. Payments and advances had been made on account from time to time until December, 1867, when plaintiff called at defendant's office and inquired of the book-keeper what amount was due him and was told it was $156.84, which was paid him, and he signed a receipt therefor "in full."

Plaintiff swears that there was no final settlement, and that he always insisted on sixty cents per foot for New York measurement. Signed the receipt for $156.84 in full, but did not read it at the time. It was not understood between us that I was satisfied with the New York measurements. I claimed all the time sixty cents per foot at New York measurement. Did not say anything to Mr. Bours (book-keeper of defendant) when the last shipment was made. Mr. Dibble was not present.

The defendant testified that he did not remember making a positive agreement to pay ten cents more if surveyed in New York than if surveyed here. There was talk of a difference, and he preferred measuring it here, and I preferred New York measurement. When Mr. Wilson came for a final settlement, he mentioned that he thought he ought to have more. After the subject had been discussed thoroughly, as I remember, he consented to a settlement as made, remarking that he did not care for his own part, but that his partner might complain. Told him if his partner would call on me and look at the sale and understand the matter he would be

satisfied; heard no farther complaint. Mr. Bours testified: I understood the settlement between Mr. W. and Mr. D. to be in full. Mr. Foster was cashier and asked me when Wilson came for the balance, what was the balance due W.? and I paid it to him. I think he was satisfied with the number of feet; said something about thinking he should have more than 50 cents per foot, but I judged he was satisfied and accepted the settlement in full; I judged so from his manner in taking the amount and saying nothing about being dissatisfied with it. Mr. Foster testified, (a receipt in full produced, signed by plaintiff,) don't know as the receipt was read to W. It was filled up by me according to my understanding of the closing of the account.

The plaintiff recalled, says: I had no idea it was a receipt in full; was in a hurry and it was getting late when I signed it. I have never had a settlement with Mr. Dibble.

Other testimony was given in regard to the difference between the measurement in New York and in Florida.

The judgment is sought to be reversed and new trial granted, upon the ground of the refusal to grant the motion for a new trial.

Fleming & Daniel for Respondent.

E. M. L'Engle for Appellant.

RANDALL, C. J., delivered the opinion of the court.

It is generally with great reluctance that courts set aside the verdict of a jury upon a consideration of the testimony alone; and a second verdict upon the same facts, although the judges may have come to a different conclusion, is too strongly fortified by the deliberate judgment of twenty-four men, to be disturbed except for strong reasons

Where a verdict is so palpably against evidence or against a very strong preponderance of evidence that great injustice seems to have been done, leading to the conclusion that the verdict was the result of prejudices or excitement or other

improper influences, there should be no hesitation about setting it aside. In the present case, however, it is not discovered that any good reason exists for such interference, and there is nothing to indicate that upon another trial the verdict would not be the same. There is some conflict between the statements of the respective parties in relation to the fact of a final accounting and settlement, or agreeing upon a basis of settlement. Other witnesses seem to support the testimony of the defendant, but their testimony goes rather to show their impressions and conclusions, than to show the facts. A receipt in full was signed by plaintiff on receiving a sum which the defendant's agents believed and informed him was the balance due; but plaintiff says he was not aware that it was a receipt acknowledging full payment; that it was signed in haste without reading it, and that it was not in fact a full payment and that he had never regarded it, or agreed to regard it, as a full satisfaction. Although it may be that we should have been satisfied of the fairness of the verdict if it had been otherwise, we cannot say that these two juries have erred in judgment.

The judgment must be affirmed.

PARAN MOODY, APPELLANT, vs. WM. CAULK, RESPONDENT.

In an action for the conversion of ordinary merchantable property, the measure of damages is the value of the property at the time of the unlawful conversion, with interest to the time of the verdict.

Appeal from the Circuit Court, Fourth Judicial Circuit, Duval county.

This was an action of trover brought in 1867, to recover damages for the conversion of a quantity of logs belonging

to plaintiff, of the value of $1000, alleged to have been converted by defendant on the first of October, 1864. Defendant pleaded not guilty. Afterwards plaintiff amended his declaration by adding a count for money had and received, upon which issue was joined. It was shown that plaintiff secured certain rafts in a lake in 1861, and they were taken away in 1864. Plaintiff's counsel inquired of B. Thebaut, a witness, what has been the value of logs in this market from 1865 to the present time? This question was objectiod to, the objection everruled by the court, and exception taken by defendant. The witness answered the question and the testimony was submitted to the jury.

The court charged the jury upon the question of damages as follows:

"Should you find for the plaintiff, you are allowed to value the logs at the highest valuation of logs from the time of conversion to the present time."

At the request of plaintiff's counsel, the judge charged as follows: "If you find for plaintiff under the trover count, you may fix the value of the logs at the highest price that they were from the time of conversion till this date, as shown by the evidence, and interest thereon." Excepted to by defendant's counsel.

The jury returned a verdict for plaintiff and assessed his damages at $1200; whereupon defendant moved for a new trial, which was denied, and defendant appealed.

Fleming & Daniel for Appellant.

J. P. Sanderson for Respondent.

RANDALL, C. J., delivered the opinion of the court.

There is but a single question raised by the assignment of errors which it seems necessary to notice, and that is, whether the court erred in the rule given to the jury for estimating the damages in case they found a verdict for plaintiff under the count for the conversion.

In that respect the court committed an error.

In the case of Robinson vs. Hartridge (13 Fla., 501, 515,) it was held that in a case of this character, the rule of estimating damages is to take the value of the goods at the time and place of conversion, and compute lawful interest thereon to the date of the verdict.

Sedgwick on the Measure of Damages, 481, says:

"I have had occasion to notice the claim of damages for the use of property which has been sold and the price paid, between the time when the cause of action accrued and that of the trial, and the analogous question where the use of the property is withheld, and we have seen that different rules have been prescribed by different tribunals. The same analogies should govern in trover; and it appears to me that on principle, unless the plaintiff has been deprived of some particular use of his property, of which the other party was apprized, the rights of the parties are fixed at the time of the illegal act be it the refusal to deliver or actual conversion, and that the damages should be estimated at that time."

This language of Mr. Sedgwick is approved in Arrowsmith vs. Gordon, 3 La. Ann. Rep., 487. The former was an action for the conversion of cotton. The rule fluctuates in some of the States, and in some the established rule differs from that in other States. Mr. Sedgwick has collated and examined the various decisions, and we can but agree with his conclusion upon principle, and we think that in actions for conversion where the subject of the action is ordinary merchandize, and like property which is the subject of traffic, or perishable property, the value at the time of the unauthorized act, with interest, is the proper measure of damages. In the case of public stocks held as an investment, of rare pictures, jewels and like articles, held otherwise than for purposes of immediate commerce, it would be equitable and proper that the highest value after conversion should prevail, if the jury should be satisfied from the evidence that

the plaintiff would have held the property up to the time of the advance in value; for the defendant should make good the actual loss sustained by reason of his act. But this suggestion is probably not applicable to the present case. Judging from the testimony and the whole record, the jury found their verdict under the count for conversion, and in accordance with the rule laid down in the charge of the court.

The judgment must be reversed and a new trial granted.

MARIA J. FAGAN, ADMINISTRATRIX OF STEPHEN FAGAN, APPELLANT, VS. GEORGE L. BARNES, SHERIFF, ET AL.

1. The entry of a judgment against a party who had appeared without giving the eight days notice required by paragraph 2 of Section 194 of the Code, and without proof that no answer had been received, is irregular. This irregularity and the peculiar circumstances of this case justified the Court in opening the judgment entered herein.

2. It is improper to unite an action for specific performance against one party, and an action of ejectment against another, in the same suit. Where, making a person a party defendant to a complaint seeking a specific performance has this effect, a motion to be made a party defendant should be denied.

The general rule is, that new parties defendant should not be brought in against the will of the plaintiff, unless the presence of such new parties is necessary to the determination of the action.

To a complaint for the specific performance of a contract, the parties to the contract are generally the only proper parties.

Appeal from the Circuit Court, Fifth Judicial Circuit, Alachua county.

A statement of the case is contained in the opinion of the Court.

O. A. Myers and C. P. Crawford for Appellants.

Finley & Finley for Respondent.

WESTCOTT, J., delivered the opinion of the court.

This complaint is brought by Maria Fagan, administratrix of Stephen Fagan, deceased, against George L. Barnes, Sheriff, and ex-officio administrator of Daniel B. Coker.

Plaintiff alleges that in January, 1865, Daniel B. Coker, in consideration of $4,500, agreed for himself, his heirs, executors, administrators and assigns, to convey to Stephen Fagan, his heirs, executors, administrators and assigns, a tract of land containing 360 acres, lying in sections 1,2,12 and 8, township eight, South, range 18, East, the said Coker binding himself, his heirs, administrators and executors, to make good and lawful warrantee titles to said Fagan, his heirs, executors, administrators. That in pursuance of said agreement, said Coker executed and delivered a deed to said Fagan in February, 1865; that the said deed was recorded February 24th, 1870. That said deed, through clerical error and mistake, mis-described the land embraced in the original contract, all of which lies in range eighteen, while the said deed describes land situated in range nineteen. The judgment prayed is that the administrator of Coker may be decreed to execute a deed in conformity to the original contract. It appears that John D. Young, who claimed an interest in these lands, was, after notice of motion to that effect, made a party defendant to the complaint. There is nothing in the record to show the character of the interest he claims except a statement that he has a deed for the same lands from one John D. Coker, and that he is an adverse claimant. This appears by way of recitation in certain motions. Plaintiff's attorneys, after notice to Young's attorneys, move to vacate this order, which motion is overruled. At a subsequent day, there being no answer or demurrer filed, the bill was taken as confessed, a judgment was entered which directed execution of a deed by Coder's administrator to Fagin's administratrix, conformable to the original contract, and such deed was executed on the 14th of November, 1870.

On the 24th of March, 1871, Young's attorney after notice entered a motion to open the decree and allow Young to answer the complaint therein, upon the ground that they were misinformed by the Clerk as to the decision of the court upon their motion to be made a party defendant, and because complainant took judgment without giving the notice required by the statute. This motion was granted by the court, its action was excepted to by plaintiff's attorneys, and from this order this appeal is prosecuted.

The return before the court discloses nothing in reference to the interest of Young beyond the fact that he held a deed recorded on the 2d day of December, 1869, from one John D. Coker, to the land described in complainant's bill.

In this case there was judgment for want of an answer. John D. Young having, before the rendition of the judgment, been made a party defendant to the suit upon his own motion, was necessarily a party to the judgment. George L. Barnes, the original defendant, as a matter of course was a party to the judgment. The Code provides that judgment on failure of defendant to answer the complaint may be had upon filing proofs of personal service of the summons and complaint, or of the summons according to the provisions of Sec. 81, and that no answer has been received. The defendant, Young, had "appeared in the action before the expiration of the time for answering," within the meaning of par. 2, Sec. 194, of the Code, having been made a party on his own motion.

It is unnecessary to decide whether, under the peculiar circumstances of this case, any proof of service of summons or complaint as to him was necessary, and we only say that the eight days notice should have been given, as well as proof that an answer had not been received. The entry of the judgment against Young being without the notice and without any proof that an answer had not been received, justified the court, under the peculiar circumstances of the case, in opening the judgment, not, however, for the purpose of per-

mitting him to answer the complaint. While the order of the court so far as it opens the judgment must be sustained, at the same time such portions of the order as authorized John D. Young to answer the complaint, cannot be sustained.

In this suit A. seeks of B. the specific performance of an agreement to execute a deed to certain lands; C. is made a party defendant on his own motion to the suit, against the wish of the plaintiff and without the consent of the defendant, upon the ground that he has a deed to the same lands from E. The question to be decided between A. and B. is not one of title, and you cannot unite an action for specific performance against one party and an action of ejectment against another. A. sets up no title, and all he seeks is to make B. transfer to him whatever interest or title he has in the estate, in accordance with his agreement so to do. Can it be said that C. has an interest in any way affecting this controversy, when he claims that he has a deed to the same lands from D.? Suppose he is made a party defendant, can he as defendant get a judgment settling the question of title between himself and the plaintiff, or can he in the event he shows that he has a deed from all of the community except B., present a decree against B. to comply with his agreement and execute a deed to A.?

As the complaint stands, it discloses no interest in D. Is it to be amended contrary to the wish of the plaintiff so as to make a case against some other party, or is this defendant to become an actor and prosecute an independent suit against the plaintiff? It is certainly not necessary that he should be a party in order to a complete determination of the question whether B. shall execute a deed to A. That he has a deed from D. has nothing to do with the question. The general rule is, that the court should not order new parties defendant to be brought in against the will of the plaintiff, unless the presence of such new parties is necessary to the determination of the action. Voor. 114, 3 Duer, 647. As

remarked by the Court of Appeals of New York, in a case where a person, not a party to the contract, was sought to be made a defendant to the action, (17 N. Y., 129,) seeking specific performance, this defendant has no interest in the question of the making of the contract, and the right of the plaintiff to a conveyance, and no relief is prayed against him. In the case of Tasker vs. Small, 3 Mylne & Craig, 63, Lord Cottenham, speaking of this subject, remarks:

"Generally, to a bill for a specific performance of a contract of sale, the parties to the contract are the only proper parties; and when the ground of the jurisdiction of courts of equity in suits of that kind is considered, it could not properly be otherwise. The court assumes jurisdiction in such cases because a court of law, giving damages only for the non-performance of a contract, in many cases does not afford an adequate remedy, but in equity as well as in law, the contract constitutes the right and regulates the liabilities of the parties; and the object of both proceedings is to place the party complaining, as nearly as possible, in the same situation as the defendant had agreed that he should be placed in. It is obvious that persons, strangers to the contract, and therefore neither entitled to the rights nor subject to the liabilities which arise out of it, are as much strangers to a proceeding to enforce the execution of it as they are to a proceeding to recover damages for the breach of it." 17 N.Y., 255; 10 Simons, 314; Fry on Specific Performance, par. 79; 5 Beav., 186; 2 Wheat., 290; 1 Sandf. Ch'y, 46; 3 Hen. & Munf. 316.

There is an exception to this general rule in some cases where, subsequently to the contract, another person with notice of the purchaser's rights has acquired an interest under the vendor, the plaintiff has been allowed sometimes to join such persons as defendant. 1 Coll., 225. This case is not embraced in the exceptions.

In the present case the party seeks to be made a defendant

against the wish of the plaintiff. The general rule under the Code is that the Court should not order new parties defendant to be brought in against the will of the plaintiff, unless the presence of such new parties is necessary to the determination of the action. In cases where the recovery of specific property is sought, I am inclined to think that wherever, under the old rule, a party would be permitted to intervene by petition, to be examined *pro interesse suo,* (Dan'l Chy., 1,074,) he would now be made a defendant, and he would to some extent become an actor. From the character of some of the cases brought to this Court, and this is among that number, it seems to be the impression that the effect of the Code is to totally abolish the old rules as to misjoinder of parties and subjects of action, and that it is only in extraordinary cases that those objections will hold. But a very casual examination of the decisions of the Court of Appeals of New York on this subject will remove such an impression. There are some exceptions, it is true, but the general rule is about the same now as it was before the Code.

We remark, for the information of the plaintiff in the court below, that an examination of the return sent to this Court discloses no evidences of service of summons upon defendant Barnes, or of waiver thereof. From the record now before this Court, it is doubtful whether the Circuit Court ever acquired jurisdiction of the action as to him. This apparent defect in the record, as well as the necessity for vacating the order, makes it necessary that we should affirm the order setting the judgment aside as to both parties defendant, leaving the plaintiff to take such course as he may be advised.

So much of the order of the court below as opens the judgment rendered in this cause, is affirmed.

So much of the order as authorized John D. Young to answer the complaint is set aside and reversed.

The case is remanded, with directions to vacate and set

aside the order making John D. Young a party defendant, and for such proceedings as are conformable to law.

As there have been errors upon the part of each party to the appeal, it is ordered that the costs be taxed against Fagin, administratrix, and Young, in equal proportions.

HILL W. HOWSE, RESPONDENT, VS. MOODY, HOWARD *et al.*, APPELLANTS.

1. Where the subject of an action is real or personal property, and the plaintiff seeks to set aside fraudulent judicial proceedings in reference thereto, he should make all persons parties who were actors in such proceedings, and who claim a present interest in the specific property. Such a complaint is not liable to the objection that there is an improper joinder of severol causes of action against different persons. It sets up one cause of action against all of them.

2. A cause of action against the sureties upon the bond of an administrator, arising from a breach of the condition of the bond, cannot be united in the same complaint with a cause of action against the administrator arising from acts of the deceased intestate in fraudulently disposing of his property. This is an improper joinder of several causes of action against different parties in the same complaint.

Appeal from the Fifth Judicial Circuit—Marion county. The opinion of the court contains a statement of the case.

Thomas F. King for Respondent.

Finley & Finley for Appellants.

WESTCOTT, J., delivered the opinion of the court.

This complaint is filed against defendants Howard and Moody, as administrators of the goods and chattels of E. D.

Howse, against Moody, Chandler & Branch, as persons claiming an interest in certain property of the intestate which they acquired through deeds of conveyance and judicial proceedings obtained by the fraudulent collusion, combination and acts of E. D. Howse in his lifetime, and of the parties Howard, Moody, Chandler & Branch since his death, and against Agnew and Roberts as sureties upon the administration bond of the said administrators, Howard and Moody, alleging as cause of action against them the failure of the administrators to file a true inventory, and that they have not truly administered according to law.

To the complaint the defendants interposed a demurrer, specifying several grounds of objection. The Circuit Court, after argument, overruled the demurrer, with leave to the defendants to answer. From this order the appeal is prosecuted.

While there are several grounds embraced in the demurrer contained in the return to this court, one only was urged or relied upon here.

This ground is because several causes of action are improperly united in the complaint, in that it embraces a demand against the estate of E. D. Howse, an action to set aside and declare void a decree in chancery rendered against E. D. & C. C. Howse, and in favor of Little Berry Branch, an action to set aside a sale of property of the estate of E. D. Howse, made under judicial process, and an action to recover damages against the sureties upon the bond of the administrators of said Howse.

In order to understand this demurrer, it is necessary to state the allegations contained in the complaint. They are substantially that Edward D. Howse died in 1867 owing plaintiff the sum of $6,528, which sum was due since January, 1857; that defendant Slowman W. Moody and James H. Howard were appointed in July, 1868, administrators of the goods and chattels, &c., of said Howse, and that

defendants Samuel Agnew and —— Irby are sureties upon the bond of the said Moody and Howard as such administrators; that plaintiff has repeatedly applied to the said administrators for payment of his said debt, but they refuse so to do, alleging insolvency and a want of assets; that in 1860, and during the life of said Howse, defendant Little Berry Branch filed a bill in chancery, in Marion county, Florida, against the said E. D. Howse and his wife, Cynthia C. Howse, praying payment of a sealed note alleged to have been made by Howse and wife, dated February 10th, 1849, for the sum of $6,500, and payable one day after date; that said Branch further alleged in said bill that Howse had no property in his own right, but that Cynthia, in her own right and separate from her husband, possessed a large amount of real and personal property; that the said Howse and wife filed an answer to said bill admitting all of its allegations, but alleging that the said Cynthia owned only a small amount of lands; that defendants having waived notice, the case was set for hearing upon bill and answer by consent, and that a decree was rendered on the 14th February, 1860, for $11,075.77, against defendants, and a fi. fa. awarded to be levied on the property of the said Howse, and when that was exhaused to be satisfied from the property of the wife. Plaintiff charges that the making of the note was a mere pretense; that the understanding and agreement between Branch & Howse was that it was to be used to obtain the decree aforesaid; that said decree was obtained to secure the property of Howse from then existing valid and just claims, and with the understanding that the property should remain in the possession of the said Howse; that all of said judicial proceedings were fraudulently and collusively conceived and executed to protect the property of the said Howse from his creditors, and that, except a small portion, all of said property, when sold, remained in the possession of Howse for seven years, and up to the time of his death;

that Branch, during all this time, received nothing upon said decree, nor did he attempt to enforce it; that ten days before the appointment of Howard and Moody as administrators of Howse, the said Moody obtained from Branch an assignment and transfer of said decree; that the transfer was made without consideration or for a nominal amount, and with a knowledge upon the part of Moody that the decree aforesaid was obtained for the fraudulent purposes aforesaid, and that it was not a just or valid claim against the estate of Howse; that in October, 1868, Moody caused said property to be sold by a master under said decree; that he (Moody) became the purchaser of both the real and personal property thus sold—his agent, S. D. McConnell, purchasing the cattle and other personal property, and his agent, W. A. Chandler, purchasing the real estate; that prices far below the real value were paid for said property, and that the deed to the real property was made by the master to W. A. Chandler; that said property was bid off by Chandler in pursuance of an agreement between himself and Moody that he (Moody) was to have the property, and that said Chandler "did not pay one dollar of his own money for said land;" that said Moody has since controlled the property; that on the 7th January, A. D. 1861, lot 2 and one-quarter of a section of land was sold at the instance of the solicitor of the complainant Branch, for his fees in the said chancery proceedings, for $705; that the said Howse and Branch became the purchasers thereof; that in October, 1861, this land was sold by Branch to Moody for $8,000; that this sale to Moody, who was the son-in-law of Howse, was for the purpose of securing the property from Howse's creditors; that no consideration was ever paid by Moody, but by an arrangement between Branch, Moody and Howse the said property was to belong to Howse; that the estate was solvent when it came to the hands of the administrators Howard and Moody; that there has been neglect in the col-

lection of the notes due the estate; that the administrators have rendered false accounts of the property, and have caused the estate to be found insolvent; that they have failed to file a true inventory of the estate; that they have not duly administered according to law, and that the said sureties are liable for these failures.

It may not be inappropriate to remark here that the prayer of the complaint is in some respects defective. If there are other creditors of equal degree, the whole of this property should not be applied to the payment of this claim alone. 4 John. Chy., 640.

From the foregoing statement it is seen that in this action the plaintiff seeks to establish his debt against Howse, and to subject certain property to sale. This property, he alleges, has been made the subject of sale under decrees which are fraudulent and collusive; that the property was purchased in at nominal prices for the benefit of the debtor by parties aware of the fraud, and that the proceedings were conceived and designed by the parties thereto to benefit the debtor at the expense of his then existing creditors; that the defendant in this decree was at the time indebted to him (the plaintiff), and that the plaintiff in the decree was not a *bona fide* creditor, and that the property has never been impressed with any equity superior to that of the creditor plaintiff.

It is apparent from the case stated that all of the defendants were not jointly and equally concerned in each distinct fraudulent act charged. There was a series of acts in this well conceived net-work of fraud, all terminating in the deception and injury of the plaintiff. The defendants performed different parts in the drama. These acts affected the property of the debtor—some the personal property, others the real estate. The object of the plaintiff in this complaint is to get the assistance of this Court in unraveling this net-work of fraud in respect to each species of property,

and to have a due application of the same to the payment of the claims of creditors.

The right of the plaintiff is against the whole property, and his right against all portions of it is of the same nature. The decree in chancery and the sale thereunder are but acts of fraud, which are sought to be set aside in order to enforce this general right. In fact, the right to set aside these proceedings can only co-exist with an equity affecting the property which was the subject of them. There can be no such thing as an equity or right to set aside these proceedings distinct and independent of rights and equities attached to the subject-matter that they affect. The result is that these are not several causes of action, but are acts which, connected with the debt due plaintiff, constitute a ground for one action alone. There can be no doubt that the debt could be proved and the property reached in the same action in a case like this, notwithstanding the decree and sale, anterior to the Code, (4 Mon., 580, 83; 4 John. Chy., 620, 631; 2 Black., 421; 7 Cranch, 89; 6 John., 139;) and there is no doubt that it can be reached in this action under the Code. 17 New York, 593.

What has been said disposes of all the grounds of the demurrer except the objection that the complaint unites with the cause of action against the administrator and the parties Moody and Chandler, a distinct and separate cause of action against defendants Agnew and Roberts, arising out of their relation as sureties upon the bond of the administrators Moody and Howard. It is true that these fraudulent proceedings and the fraudulent sale of the property which was the subject of them is one cause of action, and the liability of the sureties upon the bond of the administrators for any breach of its condition is another cause of action. We have here, therefore, in this complaint several causes of action, and if they have been improperly united the demurrer is well taken. Par. 5, § 95, p. 35, Code.

The question, therefore, is, can the two causes of action before stated be united properly?

The Code provides that the plaintiff may unite in the same complaint several causes of action, whether they be such as have heretofore been denominated legal or equitable, or both, in cases where they all arise out of the same transaction, or transactions connected with the same subject of action. The several causes of action which may thus be united, however, are restricted to causes affecting all the parties to the action; and it is required that the several causes of action must be separately stated. Par. 1, § 117, pp. 39 and 40, Code. In this case each cause of action does not in itself affect all the parties. It is not sufficient that some of the defendants be affected by each of them. All of the defendants must be affected by each of them to warrant the union of them in one suit. The defendant Chandler in this suit has no connection with the sureties, nor have the sureties upon this bond any connection with the cause of action resulting from the fraudulent acts of the intestate and the acts of the other parties, in so far as they relate to the first cause of action stated. The setting aside of these proceedings and the selling of this property has no necessary connection with the liability of the surety upon the administration bond. The plaintiff here attempts to exercise two separate and distinct rights, oue to sell the property to satisfy his debt, the other to hold these sureties liable for a breach of the condition of their bond. The equitable relief he seeks against one set of defendants, the legal against another set, not including all of the others.

There is here an improper union of two causes of action. Mr. Justice Comstock, speaking for the Court of Appeals of New York, (17 N. Y., 607,) used the following language in reference to this provision in the Code: "The authors of the Code, in framing this and most of its other provisions, appear to have had some remote knowledge of what the

previous law had been. This provision, as it now stands, was introduced in the amendment of 1852 because the successive Codes of 1848, 1849 and 1851, with characteristic perspicuity, had in effect abrogated equity jurisdiction in many important cases by failing to provide for a union of subjects and parties in one suit indispensable to its exercise. This amendment, therefore, was not designed to introduce any novelty in pleading or practice. Its language is, I think, well chosen for the purpose intended, because it is so obscure and so general as to justify the interpretation which shall be found most convenient and best calculated to promote the ends of justice."

The order appealed from is reversed, and the defendants should have judgment upon the demurrer, with leave to the plaintiff to amend on payment of costs.

D. S. BOGUE, APPELLEE, VS. ALEXANDER MCDONALD, ADMINISTRATOR OF ALL AND SINGULAR THE GOODS AND CHATTELS OF SAMUEL WILLIAMS, DECEASED, APPELLANT.

1. Where the return does not disclose an exception taken during the trial or after the judgment, the case cannot be reviewed in this Court upon any matter arising upon the trial, and the appeal will be dismissed.

2. In order to review a judgment after trial without a jury, a case or exceptions must always be made. This case should contain the facts found by the Judge and his conclusions of law, stated separately, the exceptions taken during the trial, and also those taken after judgment to his final conclusions of law.

3. Where the appellant brings up simply the papers containing the pleadings in the case and the judgment of the court, and the return contains no evidence of any exception taken at any time, or any case or exceptions, or any separate statement of conclusions of law found by the Judge, a waiver of a case and exceptions by the appellee cannot cure the defect.

Appeal from the Circuit Court, Third Judicial Circuit, Madison county.

The case, so far as considered by the court, is stated in the opinion.

Charles R. King for Respondent.

A. Patterson and *E. J. Vann* for Appellant.

WESTCOTT, J., delivered the opinion of the court.

In this case the trial was by the court upon complaint and demurrer and answer thereto. Sec. 214, par. 182 of the Code prescribes the practice where a party desires to take an appeal in such cases. The first paragraph provides that "for the purposes of an appeal either party may except to a decision on a matter of law arising upon such trial within ten days after notice in writing of the judgment, in the same manner and with the same effect as upon a trial by a jury." The second paragraph provides, "and either party desiring a review upon the evidence appearing on the trial, either of the questions of fact or of law, may at any time within ten days after notice of the judgment, or within such time as may be prescribed by the rules of the court, make a case or exceptions in like manner as upon a trial by a jury, except that the judge in settling the case must briefly specify the facts found by him and his conclusions of law."

The first paragraph plainly requires an exception to be taken, and if no exception is taken the court on appeal cannot review. Such is the uniform decision of the Court of Appeals in New York, where the requirements of the statute are substantially the same as those of our Code. 13 New York, 341. The return in this case discloses no exception taken to any of the decisions of the court, either upon matters of fact or of law. The second paragraph requires the party desiring a review upon the evidence appearing on the trial, either of questions of law or fact, within ten days after

notice of the judgment, or within such time as may be prescribed by the rules of court, to make a case or exceptions in like manner as upon a trial by jury, except that the Judge in settling the case must briefly specify the facts found and his conclusions of law. It follows that in order to review a judgment after trial by the court, we must have a case or exceptions here, and in addition, we must have a separate statement of the facts found by the Judge and his conclusions of law, or a separate statement containing the conclusions of law by the Judge.

The parties to this appeal have filed a written stipulation waiving both the case and exceptions required by the second paragraph. This, however, even if given effect to, does not obviate the necessity for taking an exception under the first paragraph. In addition to this, the parties cannot thus avoid compliance with the provisions of law regulating an appeal in its most essential respects, as well as obviate the necessity of conforming their action to the plain rules of court controlling the subject.

When the appellant, as in this case, brings up simply the papers containing the pleadings in the case and the judgment of the court, and the return contains no evidence of any exception taken at any time, or any case or exceptions, or any separate statement of conclusions of law found by the Judge, a waiver of all these things by the appellee is inoperative to cure the defect.

This return does not show that any exception was taken to any decision of the court. That precise case was considered in 3 Kernan, (13 N. Y.,) 342, and we deem it proper to insert here such portions of that opinion as have a bearing upon the two paragraphs of the Code now under consideration. The court there remark: "Under the Code, where the trial is by the court, the Judge takes the evidence, and his decision may be, and often is, made afterwards; there is consequently no opportunity to except at the trial to the

disposition which he finally makes of the questions before him on the whole case. To afford an opportunity of doing this after the final decision, is the object of the first paragraph. The exceptions which may be and must be made within ten days after notice of the judgment, are those and only those which under the former system of practice were made to the rulings of the court after the evidence was closed and before the jury retired. This clause of the section does not authorize exceptions to be taken after judgment to matters arising during the trial, and where there is an opportunity to except at the time the adverse decision is made."

As to the second paragraph, the court remark: "In order to review the judgment after trial by the court, a case must always be made. In settling this, the Code imperatively requires a statement of the facts found by the Judge and his conclusions of law. The party who prepares the case should insert this statement, which like any other part of the case, will be subject to amendment by the other party and settlement by the Judge. If it be desired to review any conclusion of fact, the case will contain the evidence bearing upon that conclusion; it will also contain the exceptions taken during the trial and those taken after the judgment to the final conclusions of law. The case, if served within the ten days, will be of itself a compliance with the first clause of the section, and no other exceptions will be required to satisfy that clause. If not served within ten days, then a formal exception must have been made and served within that time. as the authority for inserting it in the case afterwards prepared, and any exception which appears in the case as settled, will be assumed to have been made in due time. The proceeding thus prepared for the review of a judgment will contain the qualities both of a case and a bill of exceptions, as these were formerly understood. Its proper name, we think, is, a case, but it must contain the exceptions taken during

the trial and those taken after the trial and judgment, and there is no right to a review upon a question of law on any other terms. The exception must be taken at the trial if there was opportunity, or if not then, within ten days after the notice of the judgment, and it must always be stated in the case." The court then remark in reference to the precice case before it: "In regard to the present appeal, there is in the record a brief entry stating the fact of a trial, in which the question was raised and argued whether the answer showed any defence. It then goes on to state that the Judge rendered the following judgment, (setting it forth.) This entry may be called a case, but it should have stated in substance that upon the facts set forth in the answer, the Judge ruled and decided as matter of law that there was no defence to the action, and that the defendant excepted. As there was no exception, so far at least as now appears, there is no right to have a review of the judgment." See also Livingston vs. Radcliff, 2 N. Y. (2 Comstock,) 189; Colin vs. Brown, court of appeals, 1852, 1 Code Rep., (N. S.) 416.

The appeal in this case is dismissed.

HEZEKIAH BROWN, ADMINISTRATOR OF THOMAS F MCCALL, RESPONDENT, VS. WM. R. BELL AND JAMES W. JOHNSON, SHERIFF, APPELLANTS.

This is an appeal from a decree rendered in the Circuit Court for Jefferson county.

The case is stated in the opinion of the court.

W. Scott for Respondent.

S. Pasco for Appellants.

WESTCOTT, J., delivered the opinion of the court.

The decree in this case sets aside a former judgment and decree of the Circuit Court upon the ground that the cause of action upon which they were founded was a warranty of title and soundness of certain slaves sold, and that such judgment was void under the provisions of Section 26, Art. XVI of the Constitution of 1868.

The questions involved in this case are fully discussed and adjudicated in the case of McNealy vs. Gregory, 13 Fla., 417. The conclusion there reached, was, that notwithstanding the constitutional provisions, such judgments are of force and are in all respects valid.

All of the proceedings of the Circuit Court from which this appeal is prosecuted affecting the judgment rendered in 1864, and the final decree in 1867, as well as such as affect the process issued thereon, are set aside, and the case is remanded for such proceedings as are conformable to law.

NOTE—This case involving the same principles as the case of McNealy vs. Gregory, 13 Florida, 417, it is not necessary that a syllabus should appear here. For the points involved and decided, see that case.

WESTCOTT, J.

9. It is a general rule, where barratry is excepted from the risks, that if the immediate cause of the loss is a peril insured against, it is no defense that the loss was remotely caused by the gross negligence of the agent of the insured not amounting to barratry.

10. The underwriter is not liable to indemnify the insured for losses by the peril insured against, directly incurred through the frauds or gross misconduct of the insured.

11. The insurer can relieve himself by showing that the efficient and direct cause of encountering the peril was the failure on the part of the insured to act in good faith toward the insurer, or to exercise ordinary prudence in the management, navigation and care of the vessel.

12. The implied warranty of seaworthiness requires from the insured such a degree of care in the selection of his officers and crew as is necessary to obtain competent persons, and the principle extends to many other matters embraced in the contract. The burden of proof is here upon the underwriter. The presumption is with the insured after proof of loss.

13. The questions of seaworthiness and care in the navigation of the ship are questions of fact, dependent upon nautical testimony.

14. The owner has an insurable interest to the full amount of the freight, notwithstanding an advance to be charged against it.

15. The insured is not obliged to communicate any fact, as to which there is a warranty, express or implied, unless information upon the subject is particularly called for in the first instance.

16. In determining whether the master designedly cast away and destroyed his vessel, the jury must be satisfied beyond a reasonable doubt that he did so, before they can find against him. The rules of evidence are the same in civil and criminal cases. The character of the fact to be proved, and not the position of the party, determines the degree of proof to be required.

17. The verdict that "We the jury find for the plaintiff, and assess the damage at six thousand dollars, with interest from the commencement of this suit at legal rate," expresses the conclusion of the jury with sufficient certainty to justify a judgment thereon.

18. The only thing which gives verity to the correction and settlement of a case in this court, is the signature of the Judge. The want of this is a fatal defect.

Appeal from First Judicial Circuit—Escambia county.

The action was instituted by Schultz against the Pacific Insurance Company, to recover the sum of six thousand dollars with interest, being the amount of a valued policy

of insurance upon the freight of the North German barque "Mutter Schultz," on a voyage from Pensacola to England. The policy was issued to plaintiff, who was two-thirds owner of the vessel, and covers by express terms the interests of *all concerned* in the subject insured.

The declaration is in the usual form, and alleges the making of the policy, the sailing of the vessel on the voyage stated in it, and her subsequent loss by the peril of the sea.

The defendant appealed and plead to this action the following special defenses:

1. That the vessel, at the time she entered upon the voyage, was not seaworthy.

2. That the plaintiff, at the time the insurance was effected, concealed from the defendant certain material facts in relation to the condition of the vessel, which, had they been known to the defendant, would have prevented its agents from issuing the policy.

3. That the vessel was navigated upon the voyage stated in the policy with gross negligence, and her loss was occasioned by such negligence and want of skill on the part of the plaintiff, who was master of the vessel.

4. That the vessel was designedly cast away or run on shore by the master upon the voyage stated.

5. That the plaintiff is not entitled to recover in this action the sum stated in the policy, but only the difference between the estimated value of the freight contained in the policy and the amount advanced by the charterer to the master before the vessel sailed.

The case was submitted to the jury upon these issues under the charge of the court, which is part of the record here. The jury found for the plaintiff the amount stated in the policy, with interest from the commencement of this suit. After verdict the defendant moved the court to grant a new trial upon the following grounds:

1. That the verdict was contrary to law.

2. That it was contrary to the evidence.

3. That it was contrary to the charge of the court.

4. That it was contrary to the weight of evidence.

5. That the finding of the jury was so uncertain that no judgment could be founded upon it.

The motion for a new trial was overruled by the court and from the judgment upon this motion the present appeal was taken.

At previous terms of the court there had been a trial of the issues of fact by the court, resulting in a judgment for the defendant, and a mistrial by a jury. This is the third trial.

Mallory & Maxwell for Appellant.

1. The bark was not seaworthy when she entered upon the voyage, and, therefore, the policy never took effect, and from whatever cause the loss occurred, the insurers are not bound to pay. Marshall on Ins., 363, 369, 373, 368-9-7: Mumford vs. Mumford, 1 Caines' R., 520, 522; Abbott on Ship'ng, 446; 3 Kent, 205 and note *a*; 1 Arnauld on Ins., 653-4. And it is unnecessary to inquire whether fraud was intended or not, or whether the owners had knowledge of it. 1 Arnauld on Ins., 654-5.

Freight, ship and cargo, governed by same rule of seaworthiness. 1 Arnauld, 654, note, 667-8, 670, 691, 689, 690; 2 Arnauld, 1367.

2. Whether the bark was unseaworthy when she sailed is a question of fact, and the highest and most convincing proof is found in her having 8 feet water in her hold, twenty-four hours out of port, without any adequate cause for it.

The language of all writers on insurance, and of all courts adjudicating insurance, may be summed up in the following: "If a defect appear soon after sailing, without any visible cause, the inference is that she was not seaworthy when she sailed." Marshall on Ins., 373, 369; 1 Phillips on Ins., 725; 2 John. Rep., 124; 1 Arnauld on Insurance, 689, 690; 2 Arnauld, 1367.

"The warranty of seaworthiness, whether expressed or implied, is, that the vessel shall be able to perform her voyage with the cargo with which she is then loaded." Abbott vs. Braine, 1 Caines' Rep., 292, 520, 522.

"When she vessel leaks the day after leaving port, without bad weather, the presumption is against her seaworthiness when she sailed." 2 Bay's Rep., (Sup. C'rt, S. C.,) 503; 2 Parson's Mar. Law, 139; 2 McCord, 336; 2 Wash. C. C. Reports, 376; 1 Phillips on Ins., 725; 2 Phillips on Insurance, 2079.

"Where the vessel becomes leaky soon after sailing and this cannot be ascribed to any violent storm, the presumption is she was unseaworthy when she sailed." 1 Brevard, 252; Myers vs. Girard Ins. Co., 26 Penn. R., (2 cases) 192; and see Lords Ellenboro and Mansfield in 1 Arnauld on Ins., 678-9, 689-90-91, text and note.

In the case the brig Gen. Armstrong, 2 McCord, (S. C. Rep's,) the digest evidently gives a wrong report, for the facts as described show that the insurers were not liable, and the court applies the correct principle of law.

In the case at bar the three seamen declared that the weather was mild and fine, but the master and mate say that they had a fresh wind and were "hove-to" for 10 or 15 hours. But they say nothing of any extraordinary sea peril to cause the vessel to leak, nor do they show that she lost a rope-yarn, a spar or a sail, or encountered risk or inconvenience.

3. To render the insurers liable for the loss, the bark must not only have been seaworthy when she sailed, but the owners were bound to keep her so, subject alone to the perils insured against. And hence it was their duty to have gone into an intermediate port, Key West or Havana, and repaired her. 1 Arnauld on Ins., 667-8; Abbott on Shipping, 446, and see this doctrine ably discussed and enforced in 3 Kent, 3d ed., 203, part 5, Sec. XLVII,and 205, text and note. And see Arnauld also, where the decision of the Sup.

Court of Mass. declares this to be the American law of Insurance. All the French and German writers, including Emerigon and Volin, to the same effect. 2 Parsons on Maratime Law, 139, 140 and note; 12 Cush., 517; 10 Pick., 237; 2 Phil. on Ins., 2079, and see 2 U. S. Dig. 565, Sec. 109.

It is the duty of the assured to keep the vessel seaworthy while the risk attaches, if he can do so, and it seems the insurer will not be liable for loss occasioned by unreasonable neglect to keep her seaworthy."

4. "If the vessel was lost by the fault, neglect, negligence, or misconduct of the master, (part owner,) the insurers are not liable." Gwin vs. the Phœnix Ins. Co., 13 John. 450.

"If the negligence is so gross as to authorize the presumption of fraud which would constitute barratry, the underwriters are not responsible, unless the policy expressly insures against barratry. 1 McClean's Rep., 375, (the Merchants & Louisville Ins. Co. vs. Walters.)

"It is an implied exception to the risks insured against, that the assured is not entitled to indemnity for loss incurred by his own fraud, or gross fault, or his violation of law." 1 Phil. on Insurance, p. 31, Section 41; 2 Arnauld on Insurance, 775-6-7.

5. *Concealment.*—The proof is, that the vessel lay at the head of the wharf in a southeast gale, and pounded the wharf down, breaking nineteen piles, and nearly demolishing it; and that she thus received injury to her side, which caused the master to take out and renew planks on her bends. This fact was not made known to underwriters.

It may be said that the warrantee of seaworthiness absolved the master from giving this information, but such is not in harmony with the current decisions of the country, which now hold the assured to perfect good faith. Burritt vs. Saratoga Ins. Co., 5 Hill, 188; Curry vs. Commonwealth Ins. Co., 10 Pick., 535; Sawyer vs. Coasters' Mu. Ins. Co., 6 Gray, 221; Dixon on Insurance, 68,7; 2 Caines' R., 69; 1 Story C. C. R., 57; 1 Arnauld on Ins., 492-1, 540-1; 1

Story's Eq. Jur., 166, 216; 3 Kent, 282; 2 Duer on Ins., 379; 1 Wash. C. C. R., 385; 2 U. S. Dig., 177, § 326; 3 Dall., 491; 1 Peters C. C. R., 185. The law of the United States, irrespective of the warrantee of seaworthiness, demands all information, &c.

6. The master took up in advance, for and on account of his freight to be earned, £763.13, equal to $4,727.73, and this left the freight at risk only $4,272.27, and upon this amount at risk only can a recovery be had under any circumstances. Dix on Ins. and Average, 42 and note on pp. 43-4; 1 Arnauld on Ins., 241-2, 244, 266-7, 250, 207. In this case the master had no further interest in the sum of £763.13, because he had the money in his pocket. Suppose he had received all his freight in advance, could he have recovered on this policy? Certainly not; for the "insurable interest" would have passed from him and gone to the party advancing the freight. Note to 2 Arnauld 1,349-50, 1,347; 2 Arnauld, 1,282; 1 Sumner, 451; 1 Arnauld on Ins., § 303, 300; 1 Arnauld, 297-8-9, 266.

"Advances by the charterer (as in the case at bar) on freight cannot be recovered from the owner as advances on freight. He is at no risk to pay it back." 1 Arnauld, 266. (See late case of the Anastoria, quoted by the adjusters, and found in 1 Benedict's Dist. C. R., 188, where it was held that the freight was, so far as the ship-owner was concerned, paid to the extent of the advance, and was not at risk.)

7. *Master's right to sue for other owners.*—He has no such right, either to insure or to collect insurance, without express authority. Charleston Ins. and Trust Co. vs. Conner, 2 Gill, 410 (reported in 7 U. S. Dig., 213, § 16,); Griswold vs. N. Y. Ins. Co., 3 John., 321; 1 John., 205.

"*For whom it may concern.*"—1 Arnauld, 146-7-8, text and note; 1 Phil. on Ins., 383, 387, 966, 379, 380; 2 Duer on Ins., 99, § 6, 100, § 7; Abbott on Ship., 9, Ogle vs. Manyham, 77, note.

In the case at bar the master brought suit in his own

name, and for his own account, for whole amount of insurance, while he declares himself but two-thirds owner, and shows no authority from the other owners.

Submitted with brief—First, Charter party; Second, Bill of lading and receipt for advances; Third, Coast survey chart of Florida reef; Fourth, American coast pilot, Blunt's.

8. *Testimony of voyage and its incidents.*—The plaintiff, Schultz, with his mate, are the only witnesses for his cause, and the rule of evidence as to credibility must be applied to both, as both are interested—the master in $6,000 and his reputation, and the mate in $300 and his reputation.

Testimony of voyage and its incidents, for defendant, is of three of the crew, unimpeached, and who are in perfect accord as to all material points of their evidence.

What they prove.—First. That after leaving Pensacola bar the weather was mild and pleasant; that in such weather the bark began to leak, and had generally from five to eight feet water, and they never ceased pumping until she was lost.

Second. That master told them the names of the lights of Sand Key and Key West, when they saw them and passed them.

Third. That he said he would sail near the land and would not cross the Atlantic.

Fourth. That after getting ashore he instructed them to say that they saw but one light, and this a fixed light.

Fifth. That he pointed out to the mate how she would be made to "fetch up on the reef."

Sixth. That all the crew complained to master of the unseaworthy condition of the ship.

9. The master and mate swear as follows: First saw the Sombrero light-house at 4 P. M. of the day we got ashore, and it then bore north 14 miles off. The mate says, "I last saw Sombrero light at 10 o'clock P. M. of the night we got ashore, and it then bore west by south, distant 13 miles. The bark was then heading east northeast, going from four to five miles an hour, with a steady breeze."

This fixes the position of the bark exactly. At 10 P. M. she was just 37 miles northeast of the American shoal; and yet, in 105 minutes or 1¾ hours after, she ran ashore in it—to do which she must have gone 20 miles an hour stern first. See the chart of the reef, and measure with the scale. Nothing—no part of the evidence—can be so conclusive as this; and it is to be kept in view that no explanation of this extraordinary statement is offered.

It must also be borne in mind that if we take the winds, courses and distances given by the mate, and substitute for Sombrero the Key West light, her going in the American shoal is explained. The master and mate spoke with their log-book in hand, and this extraordinary statement must invalidate all they say.

10. Mr. Anderson and Mr. Willis both swear that the master told them his bark was insured at home, and Mr. Anderson says, "I think he said well insured." Eche, whose statement is unexplained and uncontradicted, says that the master's assertion to Williams was, "Unless she is teetotally lost, I will not get my insurance."

Conclusion.—1. The bark was unseaworthy at the inception of the risk, and consequently the policy never attached, and no question of owner's good faith is involved or need be raised.

2. The bark should have been taken to Havana or Key West and repaired; and the neglect to do so releases the insurers from liability for her loss, and in such case no question of the owner's good faith is involved or need be raised.

3. The bark, in seeking the Florida reef instead of pursuing her course in the middle of the Gulf, her owner committed gross negligence and carelessness and fault, which releases insurers for her loss, and this without raising a question of the owner's turpitude.

4. The master wilfully stranded her, which releases underwriters.

Do not the words "necessarily affecting the merits," clearly indicate that the Legislature meant some order or decision by the court in the progress of the cause, which affected the rights of the suitor in connection with the facts proven? What has the making or denial of a motion for a new trial to do with the merits of a case which is ripened into judgment? The court simply says it will not disturb the finding of the jury upon the facts and law. Orders of this kind were always regarded as discretionary with the court, and what is discretionary can never be said to confer any right upon anybody.

The next objection which we make is, that there is nothing in the record before the court which will justify a reversal of the judgment.

An appeal from a judgment only opens for this court purely legal objections which were properly taken and excepted to in the court below.

It will be seen from the case as settled, that there is not one exception stated in it. The case comprises the evidence on both sides, the charge of the court to the jury, the motion for a new trial, &c.

This case was prepared for the purpose of having the order denying a new trial reviewed.

In order to question the judgment, some matters of law should be presented by exception. One of the grounds taken for a new trial is the misdirection of the Judge. To make the errors of the court a ground for reversing the judgment, it must appear that the ruling was excepted to and the exceptions afterwards settled according to the Code and rules of this court. No exception to the ruling of the court on the trial appears in this case. A brief statement of the grounds of the motion for a new trial is part of the case, and the ruling of the court denying the motion is stated to have been excepted to. But of what avail is this if the appellants cannot review the order denying the motion?

All the various grounds set forth in the motion were offered as reasons to the court below for a new trial; they do not and cannot affect the judgment outside of the motion. If the court misdirected the jury, if the verdict was against law or against the evidence, then were all the matters to be considered by the court upon an application for a new trial; but I insist they are not matters to be regarded upon an appeal direct from the judgment. If the court during the progress of the trial made any erroneous ruling upon the evidence, or in giving or refusing instructions to the jury, and the action of the court was excepted to at the time, and afterwards settled in a case and exceptions, these matters might all be considered upon an appeal from the judgment.

If, as I insist, the granting or refusal of a new trial is discretionary with the court and not reviewable upon appeal, then the grounds of the motion, as well as the order denying it, must be left out of consideration in this appeal.

It is well settled that upon an appeal from a judgment, the court cannot look into the evidence with the view of determining whether or not it supports the verdict. Neither can it, under the general objection that the verdict is contrary to law, set aside the judgment; and if the misdirection of the court is the ground of objection, it must appear that the charge was excepted to, for certainly an objection or exception to an order denying a new trial in a case when such order cannot be reviewed, will not dispense with the necessity of an exception to the charge of the court when such charge is made the basis, if the same have been settled.

2. If the court should, in the present condition of the case, look into the evidence and the rulings of the court below on the trial, with the view of determining whether a new trial ought or ought not to be granted, then we say there is nothing in this record which will justify the court in setting aside the judgment.

The verdict of the jury is not contrary to law. The Judge below left the question of seaworthiness to the decision of

the jury, as matter of fact. As to the legal presumption of unseaworthiness which arises when a vessel becomes unable to prosecute her voyage a short time after sailing, without adequate cause to produce it, the judge stated the law very favorably for the appellants, but the jury found the facts against them.

The law is, that when a vessel, shortly after sailing, becomes unable to proceed on her voyage in consequence of a leak or other defect, without any adequate cause to produce sueh inability, the presumption then is that she was unseaworthy when she sailed, and it then becomes the duty of the assured to show the condition the vessel was in when she sailed, or in other words to rebut the presumption, and it is for the jury to say whether the presumption is rebutted or not.

In this case the respondent proved by a great number of witnesses that the vessel was seaworthy when she sailed, in the evidence of Mr. Kaskill, Mr. Fingil, Robert Smith, Mr. Thomas, the mate, Mr. Hughn and others.

If the testimony of these witnesses satisfied the jury that the vessel was seaworthy before and at the time she sailed, then they had a right to refer the leak refered to, not to the unseaworthiness of the ship, but to a peril of the sea. Miller vs. South Carolina Ins. Co., 28; 2 McCord Rep., 346; Patrick vs. Hallet, 1 John., 245.

Again the appellants at the time the policy was effected agreed that the vessel was seaworthy by incorporating a statement to that effect into the policy. 13 Mason & Welsby.

As to the defence of negligence and unskillfulness set up in the answer, there is no evidence before the court to show that such existed or that the vessel was lost thereby. When this defence is plead, it must be shown that the negligence was the direct and not the remote cause of the loss. 3 Sumner, 270; 13 Peters, 415; 3 Kent's Com. 395.

All the issues presented by the pleadings in this case were

decided by the jury on conflicting evidence, and the credibility and character of many of the witnesses was assailed.

The principal witnesses for the appellants were impeached by their own sworn statements, made but a few months before, in which they gave a contradictory account of the circumstances attending the loss of the ship from what is found in their subsequent evidence. Under such circumstances the court cannot set aside the verdict without passing upon the credibility of the witnesses. The following authorities are submitted on this part of the case:

A verdict should not be set aside because the court would have come to a different conclusion from that of the jury as to the force of the testimony. Fleming vs. Smith, 44 Barbour, 554; 29 California, 18.

A new trial will not be granted when the burden of proof is upon the appellant, and there is a conflict of evidence. Crook vs. Forsyth, 30 California, 662.

When the evidence is conflicting it is a question for the jury to determine under all circumstances to whom they will give credit. 36 Ill., 60; 45 Ill., 311.

In a civil cause, when the court trying it approves the verdict by refusing to set it aside and there is not an entire want of evidence, the Supreme Court will not interfere and reverse, although the verdict may seem to be greatly against the weight of evidence. 43 Mo., 359; 26 Iowa, 559.

What then is there before this court which can be looked to for the purpose of impeaching the judgment? Absolutely nothing.

When an appeal is taken from the judgment of the court or the Judge sitting as a jury, the law requires exceptions to be filed to the ruling of the court within ten days from the time such judgment is entered, and afterwards these exceptions must be settled with a case for the purpose of an appeal.

The law further requires that the legal question in such cases shall be from the question of fact. It would be strange

that the law should require exceptions to be made to the law, as stated by the court when a jury is waived, and not required any when the case is tried by a jury.

There is no exception in the record before the court except the one which relates to the order denying the motion for a new trial.

But, if the question shall be considered open here, that the order may be reviewed, then the simple duty of this court is to consider whether the court committed an error in denying the motion below.

It is not the question whether a new trial should be granted by this court upon a review of the evidence adduced on the trial or the charge of the Judge, but whether under all the circumstances the Judge so far abused the discretion vested in him in denying a new trial, that this court will reverse the order and let the motion stand as allowed.

Upon these points I refer the court to the following authorities:

No appeal lies from an order denying a new trial on the grounds that the verdict is against the evidence or the weight of evidence. Young vs. Davis, 30 N. Y. Rep., 134.

An appeal from an order granting a new trial does not bring up any questions of fact, but only questions of law. Hoyt vs. Thompson's Ex'trs, 19 N. Y., 207.

An appeal from an order denying a new trial does not affect or prevent the entry of judgment. 19 Howard, 515; 22 Howard, N. Y.

On an appeal from a judgment in an action tried by a jury, the court will not review the case upon the evidence with a view to determine whether the verdict is against evidence. Such an appeal presents only questions of law. Bedell vs. Com. Ins. Co., 3 Bosworth, 148.

The decision of a motion for a new trial can only be considered on an appeal from the order denying the new trial. 12 Abbott, 164; 22 Barbour, 650; ib., 568.

The motion for a new trial must be made before the entry of judgment. 33 Barbour, 645; 12 Abbott, 281.

Orders denying motions for new trials are not intermediate orders, necessarily affecting the merits within sub-division 2, Sec. 11, Code of Procedure. Selden vs. Canal Co., 29 N. Y.; 2 Tiffany, 634.

When there are no exceptions contained in the case as settled, nor any allusion to any, there is nothing for the Court of Appeals to review. Ward vs. N. Y. R. R., 29 N. Y.; 2 Tiffany, 616.

Objections to the ruling of the court below must be made at the trial, else they cannot be considered on appeal. Stewart vs. Harper, 4 Greene, (Iowa) 452; 16 La. Annual Rep'ts, 181; 15 Iowa, 476; 33 Missouri, 149,577.

The Supreme Court will only consider questions of law presented by exceptions and taken in the cause. If the case contains no exceptions, there is nothing for the court to review. Wilcox vs. Hawley, 31 N. Y., 648.

On appeal from a judgment in an action tried by a jury, the appellant cannot be heard upon the question whether the verdict is contrary to evidence. Anthen vs. Smith, 4 Bosworth, 503.

On appeal from a judgment, he can only be heard on exceptions taken at trial. A new trial will not be granted when the case has been fairly submitted on its merits, though there may appear to have been a preponderance of evidence against the verdict, especially if the testimony is conflicting, or if the Judge who tried the cause is satisfied with the finding. 48 Barbour, 302; 32 Ga., 472; 36 Ga., 246, 332; 30 Ill., 178; 32 Calf., 166; 23 Iowa, 308; 12 Minn., 130.

In the case of the Pensacola & Georgia Railroad Company vs. Nash, 12 Fla., 513, this court says: "When the evidence is conflicting, making it the duty of a jury to decide upon the credibility of the witnesses, the court will not set aside a verdict against evidence."

No exception whatever was taken to the charge of the court, and as to the objections made now to the ruling below, they are too late and not well founded.

The court instructed the jury, in accordance with very high authority, that in order to find for the defendant upon the fourth defence or issue, that the respondent designedly and intentionally cast the ship away, they should be satisfied of the truth of this allegation beyond a reasonable doubt. This defence involved a high criminal charge, a capital felony under the laws of the United States, which, if true, would destroy the character of the plaintiff forever. Bradish vs. Bliss, 35 Vt.; 6 Shaw, 326; Thurtell vs. Beamont, 1 Bingham, (Common Law R.,) 339.

The next objection is, that the respondent was not entitled to recover the sum of six thousand dollars, the amount stated in the policy, because, before the policy was effected, he received some advances upon account of his freight.

This is a valued policy of insurance, and it is not competent for an underwriter, after a loss has occurred under such a policy, to dispute or question the value of the subject at risk. The sum stated in the policy is conclusive on the insurer, and he is estopped from denying it. 1 Sumner, 451; 6 Cranch, 206; 3 Peters, 222; 2 Washing. C. C. R., 468; 3 Kent's Com., 361; 2 vol. Amer. Leading Cases, 587-8. In this case, the respondent only insured the amount of freight which he expected to earn, after deducting the advances. The advances were received before the policy was issued, and the sum stated in it is the amount agreed upon between the underwriter and the assured, which the assured would have probably earned had the voyage been performed.

The object of their policy is to dispense with all proof of loss, and if the underwriter agrees to a sum which in case of loss will more than indemnify the assured, and receives a premium on that sum, there cannot be found a decision in this country or Europe which will support his claim to exonerate from the payment of the full sum stated in the policy.

But the appellants were not entitled to the benefit of such a defence as this while they denied the right of the respondent to recover anything whatever. If they relied upon the question as to the amount of the recovery, they should have paid the sum which they considered due into the court, or made a tender of it, and then contested the right of respondent to the balance.

They did not ask the court at the time to charge the jury "that the sum stated in the policy was not the true measure of damages," but they accepted the charge as correct, took their chances of success under it, and after an unfavorable review to them, they then objected to the charge. To have made the rulings of the court below reviewable here, they ought to have been excepted to at the trial, and the exceptions afterwards duly settled, in accordance with the rules of the court.

WESTCOTT, J., delivered the opinion of the court.

The case presented by this record, with the exception of some objections to the law, as given to the jury by the court, and another to a matter arising upon record, is a motion for a new trial based upon a consideration of the entire evidence in the case.

The position is taken that an appeal does not lie from an order of the Circuit Court, refusing to set aside a verdict and grant a new trial, and that the exercise of such discretion cannot be here reviewed. It is insisted that granting a new trial is a matter within the discretion of the Circuit Court, not of right in the party, and for that reason is not an intermediate order involving the merits and necessarily affecting the right of the party within the meaning of subdivision one of section ten of the Code.

In disposing of this question, we deem it unnecessary to determine whether such an order is of the character mentioned in subdivision one, in view of our conclusion that

even if it is not such an order, yet the right of the party to have such an order reviewed is given by the first section of chapter 521 of the laws, and the effect of the provisions of the Code is not to destroy that right but simply to regulate the practice in its exercise. We reach this conclusion by a consideration of all of the statutes having reference to the subject matter. We give them a consistent construction, and one which we conceive carries out the intention of the Legislature in enacting the Code.

Upon an appeal from a final judgment, the act of 1853, chapter 521, gives the party the right to have such exercise of discretion by the Circuit Court reviewed by this court. The last clause of section 210 of the Code prescribes the method by which the decision of the court upon a motion for a new trial is to be brought to this court upon an appeal. The Code therefore in its letter recognizes the existence of such right. The repealing clause of the Code repeals only such statutory provisions as are inconsistent with it, and secures all rights of action given or secured by existing laws. The intention of the Legislature in the enactment of the Code was to abolish the distinction between legal and equitable remedies, and to have uniform proceedings in all cases. It was to regulate the practice but not to destroy the right. It was the right of the party anterior to the Code to have such an order reviewed, and the effect of that section of the Code authorizing appeals in certain cases is not to destroy a right to appeal in other cases, or to limit the operation of an appeal to the cases enumerated in that section. A statute regulating the practice and to some extent the appellate jurisdiction of the court, which itself prescribes the practice in the matter of appeals authorized by antecedent laws, should not be held to repeal those laws, where the general purpose of the statute is not to destroy the right, but simply to regulate the practice in such cases.

In this case there has been one trial by the court, which resulted favorably to the defendant; one mistrial by a jury,

and this the third trial by a jury, resulting favorably to the plaintiff.

The mistrial should not benefit either party, and the finding of the court for the defendant upon the facts, followed by a finding for the plaintiff by the jury upon the facts, enables us to consider the case as if it was the first trial; neither party we think can claim any advantage by these proceedings.

The verdict of the jury here is founded on the evidence of facts, complicated and contradictory, which require an investigation into the character and credit of the witnesses, whose testimony it was necessary to compare and weigh. To do this is the proper function of a jury. 1 Brevard, 150; 2 Stranges, 1,142; 2 Burr, 665; 1 Wils., 22; 1 Burr, 396, 609; Cowp., 37; 2 Wils., 249; 3 Wils., 47.

While it is true that this is the proper function and province of the jury, it is at the same time true that in cases where there is conflict in the testimony, it is within the province and power of the court to set aside a verdict which does not reach a substantially just conclusion in cases where the conflicts are of such character and the circumstances of such nature as to give just grounds for the belief that the jury acted through prejudice, passion, mistake or any other cause which should not properly control them. This power exists in the court. In exercising it the court does not encroach upon the province of the jury, for the reason that it does not conclusively settle facts in the form of a verdict, but only gives another jury the opportunity of so doing, and of correcting what appears to be a mistake. If this is not properly within the power of the court, then the result is that the first twelve men that happen to constitute a jury in a given case are by law the final arbiters of the facts in that case. There is no such principle of law.

This is a conservative and justly prized power of the court; like all powers it may be abused. It is much better, however, that exceptional cases of its improper exercise

should be endured than that the security which it affords should be withdrawn. The rule which should govern a court in the exercise of this power should be a fair view of the justice of the particular case, the character of the conflicting testimony, and the surrounding circumstances, rather than an extraordinary degree of respect for the maxim *ad questionem facti non respondent judices ad questionem legis non respondent juratores*—and wherever it appears to the court that there is difficulty in reconciling the verdict with the justice of the case, and the manifest weight of evidence, there the court should not, from a too great respect for this wise and venerable maxim, withhold its power. This is the rule which should govern the judge of the court presiding at the trial, who has the same opportunity as the jury to observe what occurs in the trial. In all cases of appeals the presumption is that he exercises this discretion properly, and the case is not presented to this court as it was to him, because this additional presumption is added to the verdict. Where he has declined to disturb the verdict of the jury, a very clear and strong case must be made out before this court would feel justified in reversing his action. It should be a very plain case to justify an appellate court in setting aside this concurrent conclusion of both court and jury, upon the ground that their action was contrary to the evidence or weight of evidence.

With this statement of the rule which should govern us in the consideration of cases involving conflicts in testimony where a new trial has been refused, we proceed to apply it to such portions of this testimony as are contradictory, and to determine what is the condition of this case in that respect. There are manifest conflicts in the testimony of the mate, and that of Grant the cook, and the two seamen, Brown and Hitchings. The mate testifies that there were ten or fifteen hours of dark and cloudy weather on the 20th, during which the wind was blowing fresh, and there was a heavy sea, the ship laboring very heavy; that during like

weather on the 21st the ship was found to be leaking, and that there was about six feet of water in the hold; that sixteen pieces of heavy timber were thrown overboard, and that the men were kept at the pumps at one time three hours, or during their watch, half the crew; that the bark became free of water on the morning of the 23d, after which, and up to the time of her loss, she made about eight or ten inches of water in twenty-four hours.

Grant, the cook, testifies that the depth of water in the bark was seven feet on the morning of the 21st. In one place he says that after the pumps were first tried, the men were kept constantly at the pumps night and day. In another place he says that after throwing over a portion of the deck load the pumps sucked; that there was an intermission of twelve hours, when the water had gained five or six inches. He says, also, that the water got to be eight feet, and that the weather was fine and the wind fair up to four o'clock on the 26th. Brown, one of the seamen, testifies that upon trying the pumps first there was two feet water in the pump-well; that on the second day out, the 21st, there was three feet of water in the pump-well. In one place he says that this was preceded by a squall and rain, and in another that from the time he left Pensacola to the afternoon of the 25th, the weather "was variable and light, with rain;" that the bark required to be pumped every fifteen minutes; that it took three-fourths of an hour spells to free her after standing fifteen minutes; that the bark was at times during the voyage free from water, when all the ship's company was employed and the weather was light; that after sucking the pumps, in about ten minutes there would be sixteen inches of water in the pump-well, and it would take four men three-fourths of an hour to suck the pumps after standing ten minutes; that the bark had to be pumped about every hour in the twenty-four, and that when the crew kept steady at the pumps, and the wind was light

and the sea smooth, they would suck about two or three times in twenty-four hours, and that she was not seaworthy.

Hitchings, one of the seamen, testifies that when twenty-four hours out the bark sprung a leak. In one place he states five feet of water was found in the pump-well at this time, in another that six feet was found; that after this, and up to the time she got ashore, the pump-well averaged eight feet; that on the third day out the master called the crew, himself among the number, aft, and asked what was best to do, when he replied that they ought to return for repairs; that the captain said, we will throw the deck load overboard, and the crew must not be alarmed, as he was going to hug the land, and that on Friday, the sixth day out, half of the deck load was thrown overboard. This witness makes six feet water in the pump-well on Monday at eight or ten o'clock. This is inconsistent with the testimony of every other witness. He also has the jettison of the timber to occur when six days out, when it happened on the third day out. He makes an average of eight feet water in the hold, when the testimony of Grant and Brown is that the men were constantly at the pumps. If what they say is true, there could be no such average. In this conflict the jury believed the mate and disbelieved the seamen, and we think the reason for their so doing is found in the record.

The witnesses, Grant and Brown, on the 30th December, 1869, when all of the facts connected with this matter must have been fresh in their minds, joined in the protest of the captain and then swore "that on the 21st day of December, the bark suddenly made more water than usual, and at one time during that day had five feet of water in her; that the leak was supposed to be somewhere in her topsides, and therefore sixteen pieces of heavy timber were thrown over from deck, after which the bark was freed from water, the leaked ceased, and the ship was dry: that when they left Pensacola the bark was tight, staunch and strong;" that the loss was owing immediately to adverse winds, heavy,

squally and foggy weather, and a strong, adverse current, which sometimes sets in across the Florida reefs from the Gulf stream, and was not the result of neglect or failure to perform their duty by either officers or crew.

It would certainly be improper either for this or the Circuit Court to set aside a verdict of a jury by giving credence to anything sworn to by persons thus plainly guilty of false swearing. What they swear to in this protest, and what they swear to in this trial, is entirely inconsistent, and for this reason the jury was entirely justified in giving no weight to their testimony in any particular. This leaves the conflict in the testimony to the statements of the mate and the seaman Hitchings. The only inconsistency we can discover in the testimony of the mate is in respect to the weather on the night of the 26th, and about that there is sufficient other testimony to have enabled the jury to form a conclusion. In respect to the testimony of Hitchings, an examination of it will disclose that he makes six feet of water in the pump-well on Monday at eight or ten o'clock, which is inconsistent with the testimony of every other witness. He has the jettison of the timber to occur when six days out; it happened on the third. He makes an average of eight feet water in the hold during the voyage, when, if what Grant and Brown say (that the men were constantly at the pumps, etc.,) is true, there could not have been such an average.

Upon most material questions the testimony of the mate is corroborated by the affidavit of James Davis, the boatswain, who joined in the protest of the Captain. This is a circumstance which the jury had a right to consider.

It was necessary in this case to compare and weigh the testimony of these witnesses. The Circuit Court could not say, under these circumstances, that the jury erred in giving credit to the mate thus corroborated by the boatswain, rather than to two witnesses who had sworn falsely with reference to the incidents of this identical voyage, and to one whose statements bore internal evidence of incorrectness in several

particulars. Even if the testimony of the one witness had been entirely consistent, we cannot see that such a case would be presented as would have required the court below to discredit the action of the jury in believing the mate rather than him, and certainly no case is presented here requiring us to set aside the action of both court and jury.

What we determine in this case is this precise proposition. Where there is a conflict between one witness for the plaintiff and three for the defendant, and the record discloses that two of the witnesses for the defendant had sworn falsely in the precise matter being investigated, and that many of the circumstances which appeared to be true were inconsistent with material facts to which the third swore, and the testimony of the one witness for the plaintiff is unimpeached in any essential particular, and is corroborated by the affidavit of another person, the court should not grant a new trial in case of a verdict for the plaintiff, unless the case presented by the testimony of the one witness for the plaintiff and the other testimony entitled to consideration is such as authorizes such action.

This, therefore,is the inquiry, which disposes of the matter of a new trial, so far as it involves a consideration of the facts of the case.

The first point made by the defendant which we consider is, that in an insurance upon the freight the vessel must be seaworthy for the destined voyage when she sailed, that the evidence discloses that such was not the case, that it is established that this vessel, shortly after sailing, and without encountering any stress of weather, accident or any peril insured against, was found in a condition from which a presumption arises that she was unseaworthy for the voyage when she sailed, that this presumption is not rebutted by the plaintiff, and that for this reason the verdict should have been for the defendant.

In what condition was this ship at the time refered to, and what was the cause of such condition, is, therefore, the

first question which arises upon the testimony. The testimony of the mate, so far as it discloses these facts, must make the case to be considered. According to his testimony, the bark left Pensacola on the morning of the 19th of December; she did not leak before she crossed the bar; she crossed the bar at eight o'clock. The weather continued fair until next day, the 20th. The bark commenced to leak on the 21st in the morning. On the morning of the 21st he sounded the pumps, and found about six feet water in her hold. On the 21st the wind was blowing fresh, weather dark and cloudy, the vessel laboring very heavy; cannot give the exact time the weather described continued—it was between ten and fifteen hours—this was on the 20th. The weather was stated in the log. On the morning of the 21st the crew were called aft by the Captain. He stated the condition of the vessel, and their answer was that they looked to the Captain as their father, and expected he would do the best for all concerned. The men were kept at the pumps at one time three hours, or during their watch, half of the crew.

A part of the deck load, sixteen pieces of heavy timber, was thrown overboard. She became free of water on the 23d in the morning. After the 23d, and up to the time of the loss, she made about eight or ten inches water in twenty-four hours. This witness says nothing as to the character of the weather on the 22d, 23d, and 24th. On the 25th he says there was a fresh breeze. At 12 M. on the 26th he says the weather was fair. At four o'clock there was no breeze, and had no steerage way on the bark from four to six. The weather continued calm until near six o'clock. From six to eight he was below, but the weather was rainy and squally. The weather from eight until she went ashore was rainy and stormy. About ten o'clock the sea was running high, the squalls came on often; they were very heavy, sometimes had to lower the tops down and clew everything up. The

night was dark, the sea at the time we went aground was very heavy.

Henry Filor, of Key West, examined for plaintiff, says he has been on board the bark since she was wrecked; her top works were staunch, strong and solid. Her bottom was out. in speaking of the weather on the night of the 26th, he says it was a heavy gale of wind: a heavy, dark night, raining heavily; wind variable and squally.

James Peat, for defendant, says the wind on that night blew heavily in squalls.

Courtland P. Williams, for defendant, says: when the bark ran ashore the wind was very fresh and squally, a heavy sea heaving in. In the squalls it blew very heavy.

Graham J. Lister, for defendant, says: the wind, on the night of the 26th December, was blowing heavy, with violent squalls, a heavy sea, and the night very dark.

F. Filor says the weather was stormy, and wrecking vessels were out.

Considerable repairs were made on the ship while in port; and the artizans employed in Pensacola in making these repairs on the bark swear that, in their opinion, she was seaworthy for the voyage; that her timbers, so far as they examined them, and to the extent they saw them, were strong and solid. They say, however, upon cross examination, that they made no examination below the water line. An expert swears that he has noticed the drainage from sticks of timber such as were put on the bark, and that he has seen seven feet of water in vessels the size of Schultz, which has slashed into the bow port and from drainage; and that the timber, with which the bark appeared to be loaded, appeared to have been in the water some time.

This, we think, is substantially the testimony in this record, which relates to the subject of seaworthiness, embracing her appearance in port, and extending from the day the bark sailed to the night of her loss. It does not include any statement of Brown and Grant.

Do these facts make such a clear case of unseaworthiness that we should reverse the action of the judge of the court below, in refusing to set aside a verdict of the jury finding the contrary? We have before stated the rule which we think should have controlled the exercise of his discretion in this respect, and the presumption is that he exercised his discretion properly.

The question of seaworthiness is one of fact, the consideration of which is peculiarly within the province of the jury; the effect of a want of it upon a contract of insurance is one of law. Therefore, in stating what we think is a rule of natural presumption as to the fact of seaworthiness, and a rule which should govern a jury in reaching a conclusion upon the subject, we do not wish to be understood as stating a rule of law, except in so far as the law enforces all natural presumptions, and authorizes a court to set aside verdicts contrary to them. The fact here, from which a presumption of unseaworthiness at the time the bark sailed was sought to be generated in the minds of the jury, was the leaky condition of the ship about fifty hours after the vessel sailed. The condition was occasioned by a leak. The simple springing a leak in ordinary weather, shortly after sailing, independent of its effects and character, should not create a presumption of unseaworthiness when the ship sailed. In all cases, however, where the proximate cause of a leak discovered shortly after sailing, and which results in a loss of the ship, or renders her incapable of proceeding on her voyage, cannot be traced to a peril insured against, or ascribed to stress of weather or some accident on the voyage, then a presumption of unseaworthiness, when the vessel sailed, should be generated in the minds of the jury, and unless that natural presumption is overcome by the assured, the insurer should be discharged. In order to create this presumption, the burden of proof of all these facts lies upon the insurer, for in the absence of testimony the ship is presumed to be seaworthy.

We do not intend by thus stating what should be a natural presumption in a case where the leak resulted in a loss of the ship, or made it necessary for her to discontinue the voyage, to say that it is not possible for the evidence to disclose such a state and condition of the ship shortly after sailing as would justify and require the jury to conclude that there was unseaworthiness when she sailed, although the condition thus disclosed was not the proximate cause either of a loss of the ship or of her failure to make the intended voyage. The question is as to the fact: Does the evidence disclose such facts as establish the conclusion that the vessel when she sailed was not in a condition to encounter the ordinary dangers of the voyage, the dangers not insured against? The bark not having been prevented from pursuing her voyage, and not having been lost through this leak, as the proximate cause of the disaster, those cases which decide that from such circumstances a presumption of unseaworthiness arises, are not strictly applicable to this case. It may be admitted that the effect of such facts is as defendant contends, and it does not affect this case. The question here is: What is the effect of the facts which the jury had a right to infer, or which the testimony tended to prove?

Viewed in this light, what was the character of the leak in this case? We have no subsequent examination disclosing its locality in the ship. We do not know the exact time that it commenced. The bark did not leak before she crossed the bar; she crossed the bar about nine o'clock Sunday morning, and the leak was not discovered until Tuesday morning. We do not know the proportion in which the volume of water going into the ship increased or decreased during this period. When the leak was discovered there was six feet water in the vessel; she could have been taking in this water from Sunday at eight or nine o'clock until Tuesday morning, say forty hours; during this time the leakage, which some experts declare often happens in the best of vessels at the commencement of the voyage, and

that which was incident to the drainage of the cargo—timber saturated with water—happened. In addition to this, and before the leak is discovered, the vessel encounters fifteen hours of weather, described by one witness as weather during which the wind was blowing fresh, the weather dark and cloudy, with a heavy sea, causing the vessel to labor very heavily; and by another—and a witness for the defendant—as a squall and wind. When the leak is discovered, the men are called to the pumps; at one time, on Tuesday, they are kept at the pumps three hours, or during their watch. In addition to this, sixteen pieces of heavy timber are thrown overboard. On the next day she becomes free of water, and up to the time of her loss, five days thereafter, she made about eight or ten inches water in twenty-four hours. During a portion of the last twenty-four hours of the voyage she encountered weather described by one witness for the plaintiff as a heavy gale of wind, by one of defendant's witnesses, as "squally weather, blowing heavily in the squalls"; by another, as "fresh and squally, a heavy sea heaving in, the wind about a reefed topsail breeze for a ship going to windward, in the squalls blowing very heavily." In addition to the use of the pumps, the evidence discloses that sixteen pieces of heavy timber were thrown overboard on Tuesday, the 21st. This may be thought to be evidence of an overloading of the ship, by which we mean a load beyond her tonnage or capacity; but here we are met by the direct and positive testimony of the stevedore, who supervised the loading, that she was not overloaded, and that in this respect everything was proper. Our attention in this connection has been called to the remark of Mr. Justice Radcliff, in Abbott vs. Broome, 1 Caines, 302, to the effect that "a vessel is not seaworthy unless she be in a condition to carry a full cargo." The question there was not a general question of seaworthiness, and the remark should be limited to the particular subject under consideration, "the question being whether the vessel was seaworthy for the purpose of

carrying to New York a cargo brought from India. It is a compliance with this warranty if the ship is in a suitable condition to carry the cargo put on board or intended to be so, it being sufficient if the vessel is fit for the service in which she is employed." 1 Phillips on Ins., 114.

We have searched in vain to find a case of this character, a serious leak remedied by the action of the pumps and by a jettison of a small portion of the cargo. We are clear that a leak, which is remedied by the action of the pumps, is not sufficient to rebut the ordinary presumption of seaworthiness in a case where all the direct and positive testimony is to the effect that the vessel was seaworthy. In this case repairs were made while in port; all the artisans employed on the ship testify that her timbers, to the extent of their examination, were sound and solid. It is true that no repairs were made below the water-line, and they are unable to speak as to the condition of her garboard streaks and like matters; but if, in a general examination of her upper works and of the timbers immediately connected with the repairs made, they find them firm and solid, the conclusion that those below the water-line were in like condition cannot be called an inference in no degree sanctioned by the testimony.

In addition to this is the testimony of one witness, who visited her after the wreck, to the effect that her upper works were sound and solid.

As to the matter of the jettison. A ship having on board nothing more than a cargo corresponding to her capacity, should be able to encounter ordinary weather without a jettison of her cargo—certainly without a jettison of any considerable portion of it. Seaworthiness implies an ability and sufficiency to carry the intended cargo to the port of destination. If this is true where the insurance is as to the ship, it should unquestionably be true as to freight to be earned by carrying the cargo, which is this case. A necessary jettison shortly after sailing with a proper load, without

encountering any peril insured against, is a fact tending to generate a presumption of unseaworthiness when the ship sailed. We have seen that no peril insured against was encountered. What was the jettison here? It was sixteen pieces of heavy timber. The bill of lading shows the cargo to have consisted of 1208 pieces of timber. The term "heavy" is very indefinite, and the only facts disclosed by which any comparison can be made is the number of pieces thrown overboard and the number constituting the entire cargo. If it be considered that they were of the average weight, we have a jettison of less than one-seventieth of the cargo; but there is not a particle of evidence by which we can estimate accurately the weight of the pieces jettisoned or of any of the other pieces, and we cannot say with any reasonable certainty what its weight was. Even if the weight was given, in the absence of testimony of an expert, any statement by the court as to its effect in elevating the topside of the ship, or its effect upon the leak, would be a judicial assumption of knowledge in matters of nautical science.

Was this a *necessary* jettison? for an unnecessary jettison cannot be evidence of an incapacity to carry the cargo on board. We are unable to determine this question with such satisfaction and clearness as should exist to justify us in controlling the discretion of the court below in the matter of granting a new trial. The evidence is wanting in that certainty which would enable even an expert to form or express an opinion. Could he determine with any reasonable certainty that a jettison was necessary, without having some definite idea as to the amount jettisoned, in a case where the leak is remedied, not by the jettison alone, but by it and the combined action of the pumps? The capacity of the pumps, a definite knowledge of the history of the decrease of the leak, the weight of the cargo jettisoned, and many other matters, would constitute elements in the formation of any clear judgment upon this subject. These facts are

not disclosed, and the burden of proof is upon the defendan as to all of them. He must prove the necessity of the jetti son, or it must appear from plaintiff's evidence; here tw of his witnesses are entitled to no belief at all, and the othe does not detail the facts, and to the extent that he relate facts, and his statement is in conflict with that of the mate we cannot say to the jury, under the circumstances, tha they should have believed him rather than the mate. Her we have one effect produced by two causes, either cause be ing of a nature to produce the effect. In a case where the evi dence as to one of the causes of the jettison is of the charac ter here indicated, can we say with reasonable certainty against a verdict of a jury and the action of the court, tha the existence of this cause was necessary to produce th effect? While we cannot say that we are entirely satisfie with the verdict, yet we can not set it aside for this cause under these circumstances.

The plaintiff in this case was the master of the bark, an two-thirds owner thereof. In addition to the matter of un seaworthiness, the insurer plead that the loss was occasioned not by a peril insured against, but by the unskillful naviga tion and gross negligence of the assured himself. He alsc plead that the master designedly cast away the bark. It is insisted that the evidence establishes both or one of these pleas, and that the verdict of the jury should have been se aside by the Circuit Court for that reason.

The direct and proximate cause of the loss of the bark was stranding on the American shoals during a gale, and in waters in which exists a current, the course and velocity of which varies. This is a peril of the sea. The general rule where barratry is excepted from the risks, which is this case, is that if the immediate cause of the loss is a peril insured against, it is no defense that the loss was remotely caused by gross negligence of the agent of the insured not amount ing to barratry. This is the law as settled repeatedly by the Supreme Court of the United States as well as by the

Court of King's Bench. 3 Pet., 222; 10 Pet., 507; 11 Pet., 213; 3 Sum., 276; 5 Barn. 3 Ala., 171.

The pleas here are, however, that the efficient cause of the stranding was either the gross negligence or design of the assured himself. The underwriter is not liable to indemnify the assured for losses by the perils insured against directly incurred through the frauds or gross misconduct of the assured. Where a loss by the perils insured against may have been remotely occasioned by the fault, or negligence, or want of the greatest degree of vigilance, prudence and forecast of the assured, and yet, without his being at all aware of such consequence, there are not wanting authorities establishing the liability of the underwriters to make indemnity. This liability undoubtedly does not extend beyond the *bona fide* acts of the assured, nor does it extend to all *bona fide* acts. This is the language of Mr. Phillips upon this subject. 1 Phil. on Ins., 3d ed., 589. Mr. Arnauld, in his work on Insurance, 2 Arn., 777, says it is not every mistake in judgment on the part of the assured that will discharge the underwriter, although such mistake may have immediately brought about the loss. If the assured acted, though erroneously, yet with reasonable prudence, and a *bona fide* desire to do the best for all concerned, the insurer will still be liable.

The following is a condensed statement of the evidence applicable to these pleas, and we must analyze it to determine the character of the act established by it:

Mate.—From six to twelve A. M. of Dec. 26th, we were steering in an easterly direction about E. to E. by N., went about thirteen to fifteen miles in four hours, from 8 to 12, allowing one and a half knots for current in an easterly direction. At 12 our latitude was 24 degrees 8 minutes, our longitude 81 degrees some minutes, about forty-five miles from the Florida coast. [From 12 to 4 neither this nor any other witness gives the course of the vessel, and her course can only be determined by taking her position at 12 and 4

o'clock.] At four o'clock I saw a light which bore due north, the vessel then heading N. by W. It was an iron screw structure painted red, the lighthouse being red and the top white. It was about ten miles off. Did not notice land inside of the light. Had no wind at four, the weather was hazy and thick, there was a squall coming in an easterly direction. [The mate does not speak with great accuracy as to circumstances between four and six.] What he says is that before six, vessel was heading N. N. E., was then on port tack, went about at six; the weather continued calm from four to six. What wind there was was from southward and westward. Had no steerage way on bark from four to six. At six he says a breeze sprung up with a squall from eastward, and that he saw a light about thirteen miles distant bearing N. N. W. one-half N., which he took to be Sombrero light. The vessel was heading N. E. by N. From about six to eight I was below. The weather during that time was raining and squally. Came on deck at eight, saw no light then. The vessel was heading at eight o'clock E. N. E., she was then on the port tack. After she came about, her course was N. E. by E. The wind was about S. S. E. The vessel was on the wind going about two knots an hour, after she went about, she was now on the starboard tack, she continued at that rate about three-fourths of an hour about quarter to nine o'clock. The wind then shifted more to eastward and the sails fell back. I then put her on the port tack. The weather was squally, the wind so variable that I could not tell the exact course; thought it about N. E. This continued about one or one and one-half hours. She made about three or four miles from eight to ten; judged the course to be a north-easterly direction. My watch was from eight to twelve. I changed her course very often during my watch. She was sometimes to eastward, sometimes to north, according to direction of the wind. Between eight and twelve, the wind was from all directions, from N. E. to S. E. in general, and from eight until she went

ashore was rainy and stormy. At ten a steady breeze sprung up from N. by W. Between ten and until she struck, wind sometimes N. N. W., sometimes N. one-half W. At ten she was on the port tack heading N. E. by E. The sea was running high from northward and eastward. Bark went about four and one-half or five knots per hour from ten until she struck. Towards ten I saw a light, while up in the mizzen, with a glass, thought it the same light seen at six; from the bearing, took it to be Sombrero light; it bore W. by S. It was only visible at times; this time I could not estimate the distance, as the weather was thick. It was a bright light and appeared to be fixed, took it for a fixed light. The vessel struck near twelve o'clock at night. When she grounded was on the port tack, course N. E.—another place N. E. one-half N. Went about four or five knots per hour from ten to twelve. Wind about N. by W. or N. N. W., with a heavy sea from N. E.

Hitchings.—This witness says that during the day, on the 26th, the wind and weather was fair. Does not know the course of the vessel. That between seven and eight o'clock a light was discovered. At nine another light was seen; one was a revolving, the other a fixed light. Thomas Brown first saw the light. Heard the Captain call their names when he got ashore. Can't say how they bore, the course of the vessel, or how far the lights were off. He says the weather at night was squally. Bark struck at about quarter to twelve o'clock at night.

Brown.—Land was seen just before dark. Weather was variable and light, with rain all the voyage, up to when lights were seen. Light was seen about "dawn of evening—about dark." Was not on deck when lights first seen; lights bore on the weather bow when first seen. About a quarter to eight I saw two lights, one revolving, the other fixed. This was about three and three-quarter hours before bark went ashore. Captain told me the names. When I first saw them they were abeam of the ship on the weather bow, and when going

out of sight, about one and three-fourths hours before bark went ashore, were upon the port quarter. Course of vessel at quarter to eight was N. N. E. [In two other places says it was N. E.] Wind, when bark passed revolving light, was N. N. W. Saw the lights up to quarter to ten. Wind, when passing the lights, was S. W. Vessel struck between half after eleven and twelve.

Grant.—The wind was fair and the weather light up to seeing light houses. Bark struck about twenty-five minutes to eleven. Saw a revolving light about five hours before, about twenty-five minutes to six. It bore to westward and northward pretty much ahead of the bark about ten miles off. It was Sand-Key light. Course of vessel about S. E. at the time. In another place, when lights first seen, bark heading N. W. Heard the Captain give the course S. E. to the man at the wheel. Wind while the lights in sight about S. W. A squall was making ahead. Captain first discovered the lights. Both Sand-Key and Key West lights in sight about four hours before she struck. Key West light bore about N. W. about thirteen miles off. The night was very dark. No moon, weather cloudy and squally. Vessel struck about twenty-five minutes to eleven. Her course then about S. E. Wind from S. W. She was close hauled and on port tack when she struck.

Protest sworn to by master, mate, boatswain, aud the two seamen, Grant and Brown:

"That the loss of the bark was owing immediately to adverse winds, heavy, squally and foggy weather, and a strong, adverse current, which it is said sometimes sets in across the Florida Reef from the Gulf Stream."

Evidence as to Weather.—One Witness for the defendant says the wind blew heavily in squalls; another that the wind was very fresh and squally, a heavy sea heaving in; another that the wind was blowing heavy, with violent squalls, a heavy sea, and the night dark, that the wind was about a reef-topsail breeze for a ship on the wind, but in the

squalls it was much heavier. The mate says that from six to eight the weather was rainy and squally, and that from eight until she went ashore was rainy and stormy. About ten o'clock the sea was running high; the squalls came on often; they were very heavy; sometimes had to lower the tops down and clew everything up.

Another witness says the weather on that night was a heavy gale of wind, a heavy dark night, raing heavily; wind variable and squally. Another that the weather was stormy, and wrecking vessels were out.

Filor.—I have navigated the waters in which the bark was lost nineteen years. The velocity of the current, which exists in these waters, varies; there is no man living there, who can give a correct account of the current; it varies from the eastward to the northward, northward and westward; sometimes no current at all, at others about five knots. Upon being asked to state the course of the current on the night of the loss of the bark, with the wind in the direction it was, he answers: It is beyond my knowledge, and could not be told by any one raised there; it is beyond any man's knowledge to tell anything about the current; in general it is a subject of dispute.

F. Filor.—Sombrero light can be seen seaward from eighteen to twenty miles, Key-West light about fourteen, and that Sand-Key light may be seen from ten to fifteen miles in bad and thick weather. The reflection from Sombrero and Sand-Key might be seen on a very clear night from the American Shoals. There is also in evidence a chart of the Straits of Florida.

If the mate's testimony gives the bearing of the light seen at ten, as well as the course of the ship and the direction of the wind at that hour, it follows that, if the light seen was Key-West light, a bearing of west by south would place the ship inside the reef at that time. If it was Sand-Key light, then the ship, if she was ten or fifteen miles from the light, with a northeast by east course, would be on a course which

if continued a few miles, would carry her on the reef at a point in the vicinity of American Shoals. If it was the light on Sombrero Key, which the mate says he thought it was, then a northeast by east course would not have carried her on the reef, and would not have placed her where she grounded, unless instead of going forward in a northeast by east course ten miles as he supposed, she went backward in a west by south course about forty miles around or through the reefs in two hours. The result of this is that, if any light was seen at ten o'clock, and there was no mistake in the bearing, it was impossible that the light seen could have been either Key-West light or the light on Sombrero Key, and that it was probably Sand-Key light.

What Hitchings says in this connection amounts to little. He knows nothing of the course of the vessel, the winds or bearings of the lights.

From Grant's testimony no very satisfactory conclusion can be drawn. He says the bark's course at six or seven o'clock, while both lights were in sight, was southeast, and the wind southwest, and that when she ran ashore, about four hours afterwards, according to his estimate, her course and the direction of wind were the same. He says nothing about the course of the vessel or wind during the four hours. All that can be said of this testimony is that if this vessel had a southeast course and a southwest wind for any considerable time before she went ashore, her going ashore could not be attributed either to neglect of the master in taking proper precautions to keep her off the shore, or to any design to place her there. She must have gone to the northward under these circumstances to get ashore, and unless there were some very extraordinary current operating, her going in that direction, under such circumstances, would be impossible.

The testimony of Brown is that the lights went out of sight about one and three-quarter hours before the bark went ashore; that when going out of sight they were upon

the port quarter. The lights seen, he says, were Key West and Sand Key lights. The difficulty in this testimony is that the course of the vessel is not given for such a length of time as to enable you to make any safe calculation. The point at which the lights went out of sight is not readily fixed, and the precise course of the vessel is given only at quarter to eight o'clock, which was N. N. E. There are some legitimate inferences to be made, however, from Brown's entire testimony. If the lights went out of sight on the port quarter, the bark's course ought to have been somewhere between east, northeast, and north by east. Now a north by east course would, in all probability, have caused her to strike the reef, but an east, northeast, or northeast by east course would not have put her on the reef where she struck. An east northeast course would have been a course about parallel with the reef. A northeast by east course would have been a course for Sombrero light, and the bark must have come in sight of this light before striking the reef, thus enabling her to shape her course with certainty. Again, if we consider the mate's and Brown's testimony together upon the hypothesis that the light seen was Sand Key light. The mate testifies that at eight, when he came on deck, the vessel was on the port tack heading about east northeast. That about eight she came about and her course was northeast by east. Now the course given by Brown, at a quarter to eight, corresponds to some extent with the course given by the mate when he came on deck at eight. If the ship's course is continued by the mate upon the hypothesis that the Sand Key light was seen at eight, we find this: That at eight the bark came about and went for three-quarters of an hour on that course, at the rate of two knots. From this testimony her position would be at this time about eighteen miles east by south of Sand Key, and about ten or twelve miles to the southward of American shoals. The mate says that the wind at this time shifted to the eastward, that he then put her on the port tack, that the weather

was so squally and the wind so variable that he could not tell her course for sometime. He thought it, however, about northeast. This course would have her heading toward Sombrero Key, about twenty-five miles distant. This, he says, continued about one and a half hours, but that he made only three or four miles from eight to ten o'clock. With this he could never have seen Sombrero light at ten with a bearing of west by south, nor could he have seen Sand Key light at ten with this bearing. It is not a violent inference from the testimony of Brown and the mate, viewed in this aspect, to place the vessel at ten at a point southwest by west of Sombrero Key about twenty miles, and about east of Sand Key twenty-four miles. At ten the mate has the bark heading northeast by east. This course would not have put her on the shoal from this point, but would have carried her a few miles to the southward of Sombrero Key. The mate says she was on a northeast course when she struck. We cannot see how this course, with a wind north northeast, or north half west, could have placed her on the shoal. With either of them he must have soon come in sight of Sombrero Key light, and thus been able to fix his position with some certainty.

These inferences are based upon the course of the ship, bearing of the lights, and the distances made as given by the testimony; calculations which any one with a chart can readily make. No estimate of the influence of the current or the effects of the adverse winds prevailing is made, and we cannot from this testimony form any definite opinion upon these subjects.

The defense is negligence of the master, and a different rule of law is applicable to his negligence than would be applicable to negligence of the other officers or crew, which the master could not be expected to prevent with ordinary prudence and care. Now it is not established by this testimony that the master had anything to do with the changes made in the course of the vessel between the hour of eight

and twelve, and while the general presumption is that the master of a ship directs her course, and it is his duty so to do, yet in this case there are facts in the testimony which indicate a change of course by the mate between eight and ten o'clock without his sanction. The master was below when the vessel struck, and the jury had a right to infer that he was below during the mate's watch, as there was no evidence of his being on deck. The master may have left the deck at eight with an east northeast course, which was a course about parallel with the reef. She soon came about, and her course was then northeast by east, according to the mate, which was a course not calculated to place her upon the reef from her then position. If the current was to the eastward, its usual course, then its tendency would have been to carry her from the shoal, and such also would have been the tendency of a northwest wind. Now all that can be said of this testimony is that, giving it the most reasonable construction that can be given, the shoaling of the ship does not appear to be a natural result following from it. This negatives any idea of design. But it is said that as the courses thus given do not account for the ship's shoaling, therefore there must have been gross negligence in the navigation; if the courses did not place her there, then we have gross negligence established; if they did, then there was design. The proposition is too broad; you must prove some act of negligence.

There are some statements of the seamen to the effect that the captain, after the stranding, expressed a desire that the bark might break in two, and one of them states that he heard the captain, on the night of the shoaling, at about 8 o'clock, say to the mate, "Here is my course, but I will put her in here." This is all he appears to have heard of the conversation. If the jury came to a conclusion in this case based upon a general view of the facts of the case, either rejecting this evidence or giving it a favorable construction,

their action in this respect affords no ground for setting aside the verdict.

This matter must be solved by the application of the rules of evidence to this testimony. Where the assured establishes a loss and shows that the direct and proximate cause of it is a peril insured against, then the insurer can relieve himself by showing that the efficient and direct causes of encountering the peril was the failure on the part of the assured to act in good faith toward the insurer, or to exercise ordinary prudence in the management, navigation and care of the vessel. The insurance here is upon the freight. The insurer engages that fortuitous dangers shall not prevent the voyage and earning of this freight, provided due means are used by the assured to attain that end. When this duty and this due means are neglected, the assured discharges the insurer from the direct consequences of such neglect, and takes upon himself the risk incident to his negligence or misconduct. Judge Story, in delivering the opinion of the court in Columbia Insurance Co. vs. Lawrence, 10 Pet., 507, remarks that a loss by fire, occasioned by the mere fault and negligence of the assured, or his servants or agents, and without fraud or design, is a loss within the policy. This doctrine was also announced by the Supreme Court of New York, in 16 Barbour, 127. These are both cases of insurance against fire on land.

Our examination of the case in the Supreme Court of the United States does not disclose that the neglect of the assured himself was set up as a defense in that case. However this may be as to fire insurance upon land, the elementary writers, Phillips and Arnauld, upon the subject of marine insurance state the rules as we have quoted them. This seems to be the view of Lord Mansfield in the case in 1 Burr, 341, where he states the general rule as to risks taken by the insurer. It is the view of Lord Ellenborough, as expressed in 1 Camp., 436, and it is the rule announced in 20 Wend., 303, and 26 Wend., 581. Chief Justice Marshall, in

the same case where Mr. Justice Story announced the rule above stated, says: "Generally speaking, insurances against fire are made in the confidence that the assured will use all the precautions to avoid the calamity insured against which would be suggested by his interest." 2 Pet., 49. Certainly an assured's interest, as a general rule, would suggest ordinary care and prudence. See also Chan. Kent's views in 1 Caines' Cases in Error, 11; also 3 Kent's Com., 300; 5 Hammond, 435. In addition to these authorities, the rule we announce is the only one consistent with the general principles incident to the contract in other respects. The implied warranty of seaworthiness requires at the hands of the assured such a degree of care in the selection of his officers and crew as is necessary to obtain competent persons, and the principle extends to many other matters embraced in the contract.

There is no doubt that the burden of proof is here upon the underwriters. This negligence must appear from the plaintiff's case, or defendant must prove it. The presumption is with the assured, after proof of loss. 4 Mason, 441; 12 Wheat., 383: 45 R., 37; 4 Camp., 234: 1 Burr, 347.

In this view, what is the present case? Unless we are prepared to say that so shaping the course of the vessel upon this voyage as to come in sight of the lights in the Straits of Florida establishes such neglect, want of care, or bad faith upon the part of the assured as excuses the insurer, we cannot disturb the verdict. This we cannot say. The lights are placed there to be seen, and as points of departure for the voyage up the Atlantic. The evidence shows the existence of adverse winds and stormy weather upon the night of the shoaling, as well as the existence in these waters of a current whose velocity and course varies.

In the absence of any satisfactory proof showing negligence or design as the direct cause of the shoaling, we cannot disturb the verdict.

The questions of seawofthiness and care in the navigation

of this ship just disposed of are, in the language of Mr. Justice Story, "questions of fact, dependent upon nautical testimony, and are incapable of being solved by a court without assuming to itself the province of a jury, and judicially relying upon its own skill in maritime affairs." McLanahan vs. the Universal Ins. Co., 1 Peters, 184. The Supreme Court of the United States will not control the discretion of the court in the matter of refusing new trials in such cases, and is thus relieved of the responsibility of considering conclusions reached by juries in such matters. Here the statute makes it our duty to do so. We refer to the remark of Judge Story to indicate to counsel the very great propriety of settling questions of nautical science by the testimony of experts in that science. Their opinions are, certainly, more satisfactory than the opinions of persons not thus skilled. When parties upon either side neglect to produce such testimony, all unfavorable consequences resulting from its absence must be attributed to their own acts.

The next point arising upon the testimony which we consider is, that the evidence discloses that at the time the contract of insurance was entered into, a large part of the freight to be earned had been paid to the plaintiff—that the amount of freight at risk was less than that covered by the policy, and that the verdict for the full sum is erroneous. Under the terms of the charter party, as well as the contract endorsed on the bill of lading, the moneys paid to the master were advanced against the freight, and were to be deducted therefrom. This is also a valued policy. The general rule is, that the insurable interest of the owner of the vessel extends to the whole amount of the freights to be earned by the voyage; and when its value is fixed by agreement, that is conclusive in the absence of fraud. Does the fact that he has pledged it to a third party as a fund from which to redeem a loan, giving him a lien upon it, change the rule? Under such a contract equities as to the freight arise in favor of the party making the ad-

vances, and he may have an insurable interest to the extent of his loan, but it does not follow that the insurable interest of the owner is diminished to the extent the freight is pledged. One who has pledged or mortgaged his interest in the ship, even to the extent of its full value, has still an insurable interest to the full value. 1 Phillips, 41; 2 Pick., 258. In this case there is a pledge of freight to be earned. The same rule which permits a mortgagor of the ship to insure for its full value, must permit a party receiving a loan or advance against the freight to insure that freight. The effect of this pledge of the freight is not relief from the debt, in the case the freight is not earned, in the absence of a stipulation to that effect. Whatever doubt may have existed in England upon that subject, the doctrine in this country is that "if freight is paid in advance, and the goods be not carried by reason of any event not imputable to the shipper, it is to be repaid, unless there be a special agreement to the contrary." 3 Pick., 20; 11 Mar., 360; 3 Kent's Com., 227; 3 Sumner, 66. We have no doubt of the owner's insurable interest to the full amount of the freight, notwithstanding an advance to be charged against it.

It is alleged that there was concealment in reference to the condition of the ship at the time the policy was applied for. This is a matter to which the implied warranty of seaworthiness extends, and the assured is not obliged to communicate any fact as to which there is a warranty express or implied, unless information upon the subject is particularly called for in the first instance. 20 John., 214; 4 East., 590; Annesly on Ins., 143; 12 Maryland, 343.

The Judge charged the jury in this case as follows: "If you find, from the evidence, that the master of the Mutter Schultz designedly cast away and destroyed his vessel, you must of course find for the defendant. In determining this question you must be satisfied beyond a reasonable doubt that the master did designedly cast the vessel away before you can find against him on this point."

This charge was excepted to, and is assigned here as error.

This defense involves a serious charge affecting the character of the master. It is a crime. It is not denied that this would be the rule if this was a prosecution of a criminal character. Does the fact that in this case the question arises simply as a defense in a matter of civil contract vary the rule as to the degree of proof which should be required? Now, the fact to be proved, whether its proof be in a civil or criminal case, is the same—the casting away of the ship by design—and the rule is that the same amount of proof which exists in one case must exist in the other—that is to say, the conclusion to be established cannot be inferred from one state of facts in a civil case, and another state of facts in a criminal case. The reason why strict proof is required is not that the one case or the other is civil or criminal, but because the nature of the conclusion to be reached in each case is of such character as the law requires strict proof to establish it. The rules of evidence are the same in civil and criminal cases. Green. Ev., 10 ed., par. 65; Abbott, J., in 2 Starkie, 116. "A fact must be established by the same evidence, whether it is to be followed by a civil or criminal consequence." 2 Russell on Crimes, 589.

The cases upon this precise point do not entirely coincide. In Thurtell vs. Beaumont, 1 Bing., 339, the defense was that the property insured was wilfully burnt by the plaintiff himself. The Judge directed the jury that "before they gave a verdict against the plaintiff, it was their duty to be satisfied that the crime of wilfully setting fire to the premises was as clearly brought home to him in this action as would warrant their finding him guilty of the capital offense, if he had been tried before them on a criminal charge." Mr. Justice Slidell, in 1 La. Ann., 219, speaking for the Supreme Court of Louisiana, says: "We think that the jury should not have been instructed to require the same full proof to discharge an insurer as would be necessary to convict the assured. The position of the claimant in the one case and

the prisoner in the other are not indentical." The same court, however, in a subsequent action upon a policy of insurance, held that "where a criminal charge is to be proved, the proof ought to be not only consistent with the prisoner's guilt, but inconsistent with any other rational conclusion;" and although it was a civil proceeding pending, the court applied this rule. The decisions upon the precise point, therefore, establish the rule to be, that the character of the fact to be proved, and not the position of the party, determines the degree of proof to be required. There was no error in this direction of the court.

The only error assigned remaining to be considered is, that the court entered judgment upon a verdict which was illegal and insufficient.

The verdict was in these words: "We, the jury, find for the plaintiff, and assess the damages at six thousand dollars, with interest from the commencement of this suit at legal rate." There is no difficulty in the clerk's calculating the interest from the date of the commencement of the suit to the date of the verdict; the periods are fixed by the verdict. There is no difficulty as to the rate. There were no issues in respect to interest, and interpreting the verdict with reference to the issues, the necessary conclusion is that the interest is at the rate prevailing in the jurisdiction of the Court. The general rule is, that a verdict must convey on its face a definite and precise meaning, and must show just what the jury intended. If there had been issue here as to the rate of interest, or any question of this character, such an issue would not have been determined by the verdict, and in such a case there might have been doubt as to the intention of the jury. In this case we think there is none, and that their conclusion is expressed with sufficient certainty to justify a judgment thereon.

In leaving the matter discussed in this appeal, we remark that among other things wanted, the case stated is not signed

or verified by the judge. This is a fatal defect. The only thing which gives verity to the correction and settlement of a case in this Court is the signature of the judge. 32 Rule of Practice Circuit Courts.

The judgment is affirmed with costs.

THE FLORIDA RAILROAD COMPANY, APPELLANT, VS. GENSLER & SILBERSTEIN, RESPONDENTS.

1. A general appearance by pleading to a complaint or declaration confers jurisdiction of the parties, and no defect in the original process, or in the return, or manner of service, can be urged as ground for reversing or setting aside the pleadings, after such appearance.

2. Where it plainly appears that the damages awarded by a verdict are excessive and not warranted by the proof, or that the finding as to the amount is contrary to or palpably unsupported by the evidence, the verdict should be set aside.

Appeal from the Circuit Court for Alachua county, Fifth Judicial Circuit.

In 1869, Gensler and Silberstein, the Respondents, brought their action in the Circuit Court for the county of Alachua, against the appellant, as a common carrier, for the recovery of the value of certain goods shipped by them from New York to Gainesville in this State, and alleged to have been lost while in the custody of the appellant. Annexed to the declaration was a bill of particulars of the plantiffs' demand, consisting of a list of the goods specifically named, with the prices and value affixed to each item, which articles are named as so many coats, so many vests, pairs of pants, three cases of boots and shoes and two chairs. The value of the coats, vests and pants is named at New York prices, in the aggregate at $432.75; of the three cases of boots and shoes

at $143.10, and of the chairs, $10, to which is added twenty five per cent., making the sum of $729.60; which, it is claimed, was the value of the goods in Florida.

The defendants denied their indebtedness and liability.

The cause was tried by a jury, who found a verdict for plaintiffs for $729.60 at the November term, 1869.

On the trial the plaintiffs introduced M. Gensler, one of the plaintiffs, who testified that a memorandum handed to him "was taken down as missing property at the time he received freight from the Railroad Company. This memorandum was made out when I discovered some goods were missing. The list was made out in my store. * * I arrived here the 11th day of October, 1868. I received some goods the 12th October. The 14th I received more goods. *I can't recollect how many packages I received after that.* I opened goods on the 14th when I received the goods. I was short one case clothing, three cases of shoes and two mahogany chairs." Witness says further that he sent out by steamer "Flag" 47 packages and more; "don't know how many. Had lost some bills of lading for that same trip. All the goods packed in New York I put on the memorandum. The goods that I packed were put in seven boxes. Only six boxes arrived, there was one box short, and the memorandum of lost goods were in one box. There were *thirteen* cases of shoes shipped; only ten arrived, and two mahogany chairs where shipped that I did not receive.—Eight were shipped and only six were delivered. The box containing the memorandum lost was not delivered to me." The witness produced a memorandum which he says was made out from goods shipped from N. Y. "The prices and value on this memorandum are correct and this amount was missing. The total amount of clothing lost is $432.75, shoes $143.10, chairs $10. This is the value in New York —$585.85. The value of the goods here is $729.60. Witness does not know how many packages were sent out from New York in the steamer."

A letter of A. B. Noyes, Superintendent of the Flori Railroad, was read in evidence by plaintiffs, in which h states to the plaintiffs that the Railroad company receiv and forwarded from Fernandina to Gainesville all the pack ges of goods shipped or claimed by plaintiffs to have be shipped by the steamer "Flag" from New York, and th the packages sent over the railroad agree with the shi freight list, stated to be 105 packages. A letter written Mr. Maxwell, agent of the road at Fernandina, states th the number of packages as appeared by the steamer's ma fest was 113, and that 112 packages were sent forward o the railroad, and that the missing package was ascertain to be "furniture." Mr. Maxwell testified that the railro received and forwarded 105 packages, besides four trun and all the packages of chairs. That the railroad compa received thirteen cases of shoes and forwarded ten at c time and three at another time.

J. B. Brown testifies that he was a public drayman Gainesville and hauled goods for plaintiffs in October, 18 and that they authorized him to haul their goods and rece for them. Mr. Brown's receipts are produced showing th he received for plaintiffs, among other goods, three cases boots and shoes at one time and ten cases of boots and sh at another time on the 13th October, 1868, making thirte cases.

Some further testimony was given on both sides, but the foregoing statement exhibits the material features of the case.

The defendant, after verdict, made a motion to set aside the verdict and for a new trial upon grounds noticed in the assignment of errors. The judge denied the motion, and judgment was entered upon the verdict in favor of the plaintiffs, and the defendant appealed.

Finley & *Finley* for Respondents.

Peeler & *Raney*, and *J. B. Dawkins*, for Appellant.

RANDALL, C. J., delivered the opinion of the court

The appellant assigns as error that the Court refused to set aside the return of service of the process by which this suit was commenced, because there was no legal service upon the defendant.

We declined, however, upon the case being presented, to hear an argument on that subject, because it appeared in the record that after making the motion and its denial by the Circuit Court, the defendant pleaded issuably to the declaration.

A general appearance and plea to the declaration has always been held by the Supreme Court in this State to give the court jurisdiction of the party pleading, and thus to waive any defect of service or even want of service. This we believe is the general rule throughout the country.

It is alleged for error, further, that the court erred in permitting the bills of lading and dray recepts to be given in evidence against the defendant. From the manner in which the record is made up, we cannot discover precisely under what circumstances the papers were offered, or the objections made, or the grounds of the objection. Such papers may or may not be made evidence, according to the circumstances under which they are offered. In this case we regard the dray receipts as very important evidence for the defendant, in connection with the other testimony.

Another error assigned is, that the verdict of the jury was unsupported by the evidence, and contrary to the evidence. The testimony, as it appears in the record, seems to have satisfied the jury that the specific goods mentioned in the plaintiffs' bill of particulars were received by the railroad company and were not delivered to the plaintiffs. The verdict, fixing the amount of the plaintiffs' damages, corresponded with the testimony of one of the plaintiffs in that respect. The verdict was for the sum of $729.60. The statement of the plaintiff was that he lost one case of

clothing costing $432.75; three cases of shoes costing $143.10; two chairs costing $10, and adding twenty-five per cent. to these, he fixes the amount at $729.60 as the value of the goods in Florida which were lost to him, and this the jury gave him.

It will be noticed that Mr. Gensler testified that the memorandum shown to him on the witness stand was "taken down as missing property at the time I received freight from the railroad company. This memorandum was made out when I discovered that some goods were missing. The list was made out in my store. I received some goods on the 12th October, 1868. On the 14th more goods. I cannot recollect *how many packages I received after that.* I opened the goods on the 14th; when I received the goods I was short one case of clothing, three cases of shoes and two mahogany chairs. He did not know how many packages were sent by the steamer from New York and had lost some of his bills of lading. The goods I packed were put in seven boxes and only six arrived. There was one box short and the memoraudum of lost goods were in one box. There were thirteen cases of shoes shipped and only ten arrived. Eight chairs were shipped and only six arrived." It is demonstrated as clearly as it is practicable to do so, that the $729.60 named by the jury, was the $729.60 given by the witness. And it is shown by the testimony of Mr. Brown, the drayman, and by his receipts, that thirteen cases of shoes, the precise number shipped by the plaintiffs, were delivered to Mr. Brown for the plaintiffs at the depot in Gainesville and that Mr. Brown was authorized to receive them. If the three boxes or cases of shoes were not delivered to the plaintiffs at their store, it is evident that the defendant should not be charged with the loss of them. Again: the plaintiff, Gensler, testified that he missed the goods on the 14th October when goods were being delivered at his store, and then made out the memorandum of missing goods. That he received goods after that, but "does not recollect how many

packages after that." This memorandum was doubtless the memorandum of goods upon which he estimated his loss, and it would seem that it was made out while receiving goods and before all the goods received were delivered to him. This may not have been the aspect of the case before the jury, but this is what we learn from this record. If our view of the testimony is correct, the memorandum of goods lost was made out and the loss estimated before it could have been known what goods were lost, and the plaintiff says he does not know how many packages were afterwards received by him. Mr. Brown's receipts show that he received for plaintiff's *after* the 14th October, (when the goods were missed by plaintiffs,) several boxes, barrels, cases, &c., of goods.

It may be that the list of goods mentioned in the bill of particulars is the list or memorandum mentioned by Mr. Gensler, but the case as presented does not show that the goods mentioned in the bill were in the box or case which was missed. The bill calls for certain specified articles, but it does not appear that the specified articles were in the lost box. Doubtless the jury were satisfied of the fact, and it may be that they inspected the memorandum from which the witness testified, but the record does not show it. This apparent absence of a substantial link in the testimony, as to the identity of the goods, standing alone, might not warrant us in disturbing the verdict of the jury, because we ought to presume, probably, that the goods were identified to their satisfaction, otherwise than by their estimated value. But as to the boots and shoes we think a grave mistake was made, and upon the showing in the case stated in the record, the verdict was in this respect clearly excessive and against the evidence, and must he set aside for that reason. There is some confusion in the statements and letters of the agents of the railroad company as to the number of packages received and forwarded by railroad, but there is none as to the delivery by the defendant to the drayman of the plaintiffs

of the thirteen cases of shoes, and it can scarcely be said that there is any conflict of testimony upon that subject, for the plaintiff, Gensler, does not controvert the testimony of Brown or the correctness of his receipts for the goods.

The judgment is reversed, and the Court below is directed to set aside the verdict and grant a new trial.

JAMES K. SHAW, APPELLANT, VS. WILLIAM NEWMAN, RESPONDENT.

1. Where the question is purely as to the credibility of one of two witnesses, the verdict of the jury should not be set aside.

2. A person who caused himself to be registered as Robert Daniels is known and called Robert Stevens. He is selected, summoned and sworn as a juror under the name of Robert Stevens: *Held*, That this difference in the name by which the party was registered and the name under which he was summoned and sworn, is not sufficient cause to set aside the verdict, where it appears that he was the identical person registered and the person as to whom the County Commissioners exercised their discretion in selecting jurors for the term. The issues being tried by a person possessing all the legal qualifications to try such issues, neither party can object to this difference in the name.

This is an appeal from the Second Judicial Circuit, Gadsden county.

The facts, so far as they are considered by the court, are stated in the opinion.

Davidson & Love for Appellant.

Stephens & Love for Respondent.

WESTCOTT, J., delivered the opinion of the court.

The testimony on the trial is not embraced in a bill of exceptions, according to the requirements of the practice antecedent to the Code, nor does the record contain a case or exceptions enabling us to review conclusions of fact by the jury, in conformity to the requirements of the Code. We cannot, therefore, review any action of the court based upon a consideration of the entire testimony. The exception of the defendant to the order of the court overruling his motion for a new trial, is therefore not before this court, in so far as it involves a consideration of the testimony taken upon the trial. We would remark, however, that if the evidence upon the trial was as we find it in the record, it would not authorize us to reverse the action of the court in this respect. The conflicts are direct between one material witness for the plaintiff and one for the defendant. To determine upon the credibility of the witnesses is the function of the jury. Where the question is purely one of credibility, the verdict should stand. The only question made upon the motion to set aside the verdict which is brought to our attention, is the question raised with reference to the competency of one of the jurors of the jury which determined the issues in this case. In reference to that question, there is an exception certified by the Judge, which sets forth the facts with such certainty and in such manner as presents a question of law and enables us to review the action of the Circuit Court in that respect. The objection is, that while one of the jurors was registered on the list of voters as Robert Daniels, yet he was selected, summoned and sworn as Robert Stevens. From the facts set forth in the exception as authenticated by the Judge, it is apparent that the person who discharged the function of a juror possessed all the qualifications required by law to render him competent. It is plain that he was a registered voter, that he was a person as to whom the County Commissioners had exercised their

iscretion and judgment in making selections of jurors, and hat he was duly summoned, returned and sworn. A difference in name amounts to nothing for this purpose, unless there is a difference in the identity of the person. It is not pretended that the County Commissioners and other officers, in using the name Stevens, did not mean the identical person who had registered as Daniels. This juror, when he registered, determined his name to be Robert Daniels. The inhabitants of the vicinage, as well as the officers whose duty it is to select returned jurors, call him by another name, and under that other name he discharges the duty of a juror. The issue in this case was tried, so far as this juror is concerned, by a person possessing all the legal qualifications to determine such issues. This, we think, is all the defendant can ask.

The judgment is affirmed.

PEREZ FRIDENBERG, RESPONDENT, VS. CALVIN L. ROBINSON, APPELLANT.

1. In an action against the endorser of a draft, he pleaded that "after the plaintiff informed defendant of his discharge as endorser on the draft in said plaintiff's declaration mentioned, the said defendant, in consideration of the said discharge, paid and discharged other pretended demands held by the said plaintiff against the said defendant, which the said defendant did not consider and believe he was legally bound to pay:" On demurrer, *Held*, That this plea does not set up a legal or equitable consideration for a discharge, but only an alleged reason for paying other claims held by plaintiff.

2. The question at issue being whether an agreement made between one who acted as an agent for plaintiff and an acceptor of a draft sued whereby time was given to the acceptor, was authorized by the [illegible]ently ratified by him, and whether there was a

consideration for the agreement; and the court charged the jury, "If you find that the plaintiff did not authorize his agent to *make* the agreement, and that if the agent paid over the amounts (received under the agreement) on his own responsibility, it does not bind the plaintiff," which charge was excepted to; *Held*, That the charge was calculated to confine the inquiry of the jury to too narrow grounds; that one question was whether the alleged agreement was binding upon the plaintiff, and if the jury should find that the plaintiff did not authorize the *making* of the agreement, but that he received a benefit therefrom and knowingly acquiesced in it after it was made, he was equally bound by it as though he had originally authorized it.

3. If, after a bill becomes due, the holder for adequate consideration agrees with the drawee of the bill to give him further time for payment without the concurrence of the other parties entitled to sue such drawee, they will, in general, be discharged from all liability. So, also, if the holder, without such consideration, take fresh security or a new bill, and agree to give time without the concurrence of the other parties. But a mere agreement to delay without consideration will not bind the holder, and therefore will not discharge the other parties.

4. If a Circuit Judge neglects to comply with the provisions of the act of the Legislature approved January 3d, 1848, relating to instructions to juries and the signing and sealing of his charge, and the instructions given or refused, and exception be taken before the Circuit Court to such omission, upon a motion for a new trial, such neglect will be deemed error, and the judgment reversed.

Appeal from the Fourth Judicial Circuit—Duval county.

The plaintiff sued Robinson as endorser of a draft drawn by Hardee & Haddock upon John T. Gilchrist, of New York, and accepted by him, payable to the order of Robinson, dated May 29, 1866, sixty days after date, for one thousand dollars. The defendant pleaded that after protest of the draft, plaintiff informed him that he had made a contract with acceptor for the payment of the draft by the acceptor satisfactory to the plaintiff, and that defendant was discharged as endorser. And for further plea, that after plaintiff informed defendant of such discharge, the defendant in consideration thereof paid and discharged other pretended demands held by plaintiff against him, which defendant did not consider and believe he was legally bound to pay. And for a further and additional plea, defendant says that after

protest of the draft, and before the commencement of t[illegible] suit, the plaintiff instituted a suit in the State of New Y[illegible] upon said draft, and another draft for $800, drawn and [illegible] cepted by the same parties, and that on the first day February, 1867, plaintiff recovered a judgment in said s[illegible] and on the same day the plaintiff, without consent of [illegible] fendant, entered into a valid agreement with said Gilch[illegible] for the payment of the judgment, by the terms and le[illegible] effect of which agreement Gilchrist stipulated to pay a[illegible] the plaintiff to accept one hundred dollars per month, to [illegible] applied on said judgment until the same was fully pai[illegible] and that under said agreement Gilchrist paid and plaintif[illegible] received on said judgment one hundred dollars per month, [illegible] and failed to pay the balance due thereon, by reason of his becoming insolvent.

The plaintiff joined issue upon the first mentioned plea, and demurred generally to the second. As to the third plea the plaintiff replied that the alleged agreement was made by one Henry Fridenberg with Gilchrist, without the authority or consent of the plaintiff, and without consideration to him; that the proceedings against the acceptor were instituted at the request of defendant, Robinson, and with his knowltdge and consent; and that said Gilchrist did not become insolvent after the recovery of the judgment, but did so become before the draft became due.

The court sustained the demurrer to the said second plea, and the cause was tried before a jury upon the issues joined.

The court charged the jury as follows:

"This action is brought upon a draft given by Hardee & Haddock upon Gilchrist, of New York, endorsed by C. L. Robinson, to Fridenberg.

"If you find that Fridenberg, after the judgment against Gilchrist, made a new contract, or for a valuable consideration extended the time for the payment of the drafts so as to have prejudiced the rights of the endorser without the consent of the endorsee, or if he extended the time beyond

that time in which the money could have been made by process of law, without the consent of defendant Robinson, and the acceptor became insolvent, he is not entitled to recover. To the above charge of the court, defendant by his counsel then and there excepted, which constitutes defendant's first exception.

"But should you find that an agreement made with acceptor, Gilchrist, was not made by Fridenberg, or if made by him, or acquiesced in by him, with the knowledge and consent of endorser, Robinson, then he, Robinson, is responsible. The extending of time after judgment is not a valuable consideration, unless there was a condition precedent showing that the plaintiff could not enforce the judgment for want of assets in acceptor. To which charge of the court defendant by his counsel then and there excepted, and this constitutes defendant's second exception.

"If you find that the plaintiff did make this agreement, and that Robinson acquiesced in it, (I mean the agreement to pay $100 per month,) then you will find for the plaintiff. To which charge of the court defendant by his counsel then and there excepted, and this constitutes defendant's third exception.

"If you find that plaintiff did not authorize his agent to make the agreement, and that if agent paid over the amounts on his own responsibility, it does not bind the plaintiff. You are to judge from all the evidence as far as it may be possible, and decide from the mass of testimony the truth, and render your verdict accordingly. To which charge of the court the defendant by his counsel then and there excepted, and this constitutes defendant's fourth exception."

A verdict was returned for the plaintiff for the amount of the draft and interest. Defendant moved for a new trial, which was denied, and defendant appealed.

Bisbee and *Archibald* for Appellant.

J. M. & J. H. Baker for Respondent.

The principle that endorser of a draft or bill will l discharged by a valid agreement between the holder and a ceptor, whereby time is given to the acceptor for payme of the bill after it is due, is fully admitted to be good i law.

To operate as such discharge, however, the agreemer must be clear that for the time thus given to acceptor b holder, that such time was given with the concurrence of th endorser, and it must also be founded on a valid and valu ble consideration. Story on Bills, 426; 12 Wheaton, 5

An agreement by holder to acceptor to give time for p ment and to receive payment from him by instalments made without consideration, is *nudum pactum*, and d not discharge endorser. Bayley on Bills, 360; Chitty Bills, 414.

If there be any evidence of the assent of the drawer endorser to the security being taken and time given to ceptor, or if, after notice of time given, the drawer or end ser promise to pay, he is precluded from taking advant of such indulgence. Chitty on Bills, 415, 49.

The endorser consenting to the plaintiff using any me to establish payment from acceptor without prejudice to *h* right to recover from drawer, was held to amount to an a sent to the holder's giving time, Chitty on Bills, 415.

When the acceptor accepts the bill for the accommodatio of drawer, and has no effects to withdraw or remedy to pu sue when compelled to pay, he therefore suffers no injury b time being given, and cannot defend himself upon th ground. 3 Camp., 281; Chitty on Bills, 416, (note.)

The time of payment must be given by a contract th is binding on the holder of the bill. A contract witho consideration is not binding on him, since the delay und such contracts is gratuitous and the liability of endorser not discharged by such contract. Ross on Com. Law, 43

Receiving part of the debt from the acceptor, after the drawer has been duly fixed, works no prejudice to the holders's rights against drawer and endorser, for it is in aid of all the parties. 3 Kent's Com., 78.

John T. Gilchrist, the acceptor, gave no consideration for the agreement alleged to have been made with him granting additional time for payment.

A judgment does not change the character of the debt; it is a debt still; it is only a step taken to insure payment for the advantage of all.

There was nothing in the agreement which would have prevented execution issuing at any time after it was made.

The judgment at the special instance and request of defendant as endorser, without the knowledge or consent of plaintiff, so that the confession of judgment was no consideration to so moving Fridenberg to give time.

Plaintiff, Fridenberg, refused repeatedly to sue Gilchrist and gave the defendant ample opportunity to pay the draft and take his remedy against the acceptor. Did not pay the draft, but got permission to use Fridenberg's name to sue Gilchrist at his, Robinson's, cost. Defendant procured the services of Henry Fridenberg to bring suit for him; this is not denied. Henry Fridenberg, at the request of Robinson and as his agent, secured a judgment by confession from Gilchrist. Then the procuring judgment was clearly the act of Robinson, with which plaintiff had nothing to do.

Was the alleged agreement part of the same transaction or was it not? If it was, then surely it is equally clear that it was Robinson and not Fridenberg who granted time; if it was not, then time was given after judgment taken, and the confession could not be regarded as a consideration for giving the time.

The plaintiff nowhere admits in the pleading that the alleged agreement was a valid agreement, or in anywise binding on him. It is necessary for the defense to prove not only that the agreement was made by the plaintiff, but that

it was founded on a valid and valuable consideration, or his defence fails. *He has shown neither.*

The evidence of defendant in support of his defence shows:

1. That the alleged agreement with Gilchrist, the acceptor, was made by Henry Fridenberg, but fails to show he had any authority to represent the plaintiff, or any consideration.

2. It shows that John T. Gilchrist was insolvent at the time said draft became due.

3. It shows that he had no funds in his hands at any time to pay the same belonging to the drawer or endorser.

4. It shows that under alleged agreement, a part of the amount due by acceptor was paid to Henry Fridenberg, being and by him used to credit of plaintiff.

5. Defendant, unsupported by any other fact or circumstance, swears that plaintiff told him that he, defendant, was discharged.

1. In reply, plaintiff shows that after notice of protest to Robinson, he made frequent and earnest demands upon the defendant for payment of the draft, which, on various pretexts and promises, was from time to time postponed.

2. That defendant urged the plaintiff to sue Gilchrist and make an effort to collect from Gilchrist and relieve him. That plaintiff positively refused to do, always telling defendant that he looked to him to pay the draft, and that he would not look to Gilchrist, who was known to be insolvent.

3. That defendant, through his clerk, J. C. Greeley, wrote to Henry Fridenberg, after refusal of plaintiff to do so, requesting him to sue J. T. Gilchrist, and promising to pay all costs and expenses to said Henry for his services.

4. That acting under such instructions and promises, Henry Fridenberg took judgment under the alleged agreement without the knowledge of plaintiff.

5. That plaintiff did not know the agreement was made

until two months had expired and two instalments paid under it.

6. That as soon as it was communicated to him that the agreement was made, he went to defendant and informed him of it. Defendant, too, had previously been informed. Defendant not only expressed his assent, but his approbation and even gratification.

7. That there was no other evidence to show that plaintiff gave his assent or approbation—he merely acquiesced when he found agreement approved by the defendant.

8. The plaintiff shows positively that defendant, by his promises to pay, procured from him indulgence before and after the agreement was made, and for a long time after the failure of Gilchrist to comply with his agreement, and this testimony is corroborated by Judge Price, then his attorney, also by all the circumstances.

9. Plaintiff directly contradicts the defendant's statement that he told him he was discharged. Judge Price corroborates the plaintiff's and says that Robinson, when frequent demands were made for payment after Gilchrist failed to pay, "did not refuse to pay," did not claim to be discharged. All the circumstances of the case also corroborate plaintiff's testimony and fully rebuts defendant's testimony as to claim of discharge.

Evidence of defendant's promise to pay was intended as a rebutter of discharge. It shows that defendant did not claim on or upon such defence until after suit.

When instructions in writing are presented to the judge, it is his duty to declare in writing his ruling thereupon as presented, and to pronounce the same to the jury as given or refused. Act of 1848, p. 12, Chap. 140, Sec. 2.

When instructions are requested, it is the duty of the judge to write out and declare to the jury his own ruling. Act 1848, p. 12, Sec. 3.

Parol evidence of an agreement made between the par-

ties subsequent to the contract, is admissible. Ross on Bills, 116; 1 Greenleaf, 304.

Plaintiff is not estopped from proving want of consideration of agreement by parol agreement. 1 Greenleaf, Sec. 304.

The alleged agreement was not between the plaintiff and defendant. The question of consideration arises collaterally. It was necessary for defendant to show an agreement founded on a good consideration, or his defence fails.

The charge of the court should be confined to the matters in issue. Hall vs. the State of Florida, 9 Fla., 203.

It is not error for the court to refuse instruction not applicable to the issue or the evidence in the case. 9 Florida, 269.

The court is not bound, on the motion of either party, to repeat what was substantially given in his general charge to the jury. 12 Fla., 563.

RANDALL, C. J., delivered the opinion of the court.

The question first presenting itself in the record is, whether the demurrer to the second plea was properly sustained by the court.

The plea alleges that after the plaintiff informed the defendant of his discharge as endorser of the draft in question, and in consideration of such discharge, he paid other demands held against him, which he did not consider himself legally bound to pay.

This does not charge that the defendant was discharged by the plaintiff in consideration of the defendant's paying the other demands or money, but merely that he voluntarily paid other debts, which he thought he was not bound to pay, because he was discharged from the demand in suit. In other words, it alleges a reason which moved him to pay the

supposed doubtful liabilities, but not a consideration for his discharge.

The appellant insists that the plaintiff was estopped by the admission, implied from the demurrer, of the facts alleged in their plea, "and that the admission was inconsistent with the evidence proposed to be given, or to the claim set up," &c.

But we are at a loss to discover the application of this doctrine of estoppel applied to this plea. It does not allege that the subsequent claims so paid were not valid debts of the defendant, nor that the plaintiff induced him to pay such doubtful demands by informing him of the discharge, or promising a discharge. The plea does not contain matter of equitable estoppel, or estoppel *in pais*, and is well met by a general demurrer. There is no pleadable fact alleged which is applicable to the cause of action.

The demurrer, therefore, was well sustained.

The first error assigned is that the court admitted testimony to prove a promise by defendant to pay the draft after he was discharged by the agreement between plaintiff and Gilchrist.

This assumes that defendant had shown that he was discharged, the very point in issue to be decided by the jury. The defendant had testified that he deemed himself discharged upon the information given him by the plaintiff. The plaintiff says he had not discharged defendant or told him he was discharged, and the evidence of a promise to pay, if such was given, was in corroboration of the plaintiff upon the issue of veracity between the parties. The suit was not brought upon the new promise, but the promise may well have been introduced as collateral evidence, touching the question of discharge, and it does not seem that such testimony was improper to be admitted.

The second and third errors assigned are that the court erred in each subdivision of his charge to the jury, and in not making his charge clear and intelligible.

Each paragraph of the charge was excepted to, as appears by the record. It cannot be expected that a charge required to be written by the Circuit Judge in the midst of the confusion of a contested trial will be as perfectly or logically framed as though it was prepared under more favorable circumstances. Hence in this, as in many cases, the charge is not framed with that precision which might be expected if time or opportunity had been had to perfect it. We do not discover, however, that anything contained in the first three paragaaphs excepted to could have misled the jury. The fourth paragraph of the charge, however, may have influenced the jury unfavorably to the defendant. It is in these words: "If you find that plaintiff did not authorize his agent *to make* the agreement, and that if agent paid over the amounts on his own responsibilily, it does not bind the plaintiff." Now, it is well understood that an agent may exceed his authority, so that his principal will not be bound by his acts: but if the principal afterwards aquiesce and accept the results and benefits of the unauthorized act, having knowledge of the facts, the act of the agent becomes the act of the principal by such ratification. One of the matters in issue in the case at bar was whether a new and valid agreement was made by the plaintiff (or ratified by him, and thus becoming his own act,) for the giving of time to the acceptor without the knowledge and consent of the defendant: that time was so given for payment to the acceptor, and that before payment was made in full by the acceptor, and after the agreement was entered into, the acceptor became insolvent, by reason of which delay of the plaintiff the defendant is affected to his damage. This is a good plea in bar, and it is so conceded by the court in the first paragraph of the charge.

If, then, the agent of the holder, without the consent of the endorser, made an agreement with the acceptor, by which agreement, and resulting from it, the endorser has been embarrassed or has lost the means of indemnifying himself,

the acceptor becoming insolvent in the meantime, and the principal has ratified the agreement, directly or indirectly, without the consent of the endorser, it *does* "bind the plaintiff" in his suit against the endorser. These matters of fact are for the jury to determine, and their field should not be so circumscribed as to confine their inquiry merely, upon this branch of the case, to the original authority of the agent to enter into the agreement, and exclude the farther question as to the ratification by the plaintiff of the contract. We do not think the terms of the agreement are very clearly shown by the testimony contained in the record, and perhaps if the charge of the court had been more full and explicit, the result might have been the same; but because the jury may have been misled by the too brief and general charge in this particular, it is erroneous. Hilliard on New Trials, 45; 1 Cal., R. 353; 11 Pick. 140; 22 Texas, 708; 8 Georgia, 693.

The law applicable to the case at bar, (as we understand the case,) is that laid down by writers. If, after a bill or note becomes due, the holder, for adequate consideration, agrees with the drawee of the bill or maker of the note to give him time for payment, without the concurrence of the other parties entitled to sue such drawee or maker, they will thereby, in general, be discharged from all liability, although the holder may have given notice of non-payment. Story on Prom. Notes. § 413, *et seq.*; Chitty on Bills, 408. And if without such a consideration he take fresh security, as a renewed bill, or a *cognovit* or warrant of attorney, and also agrees to give time, he thereby discharges the drawee and endorser. It is said, however, that the merely taking fresh security payable at a future day, but without a bargain to give time, will not discharge its drawer, it appearing that the second security was taken only as a collateral. Story Prom. Notes. § 416; Chitty, 409 and cases cited. But it is admitted that the mere receiving *further security*, payable at a future day, would, in general, imply an engagement to wait till it be-

comes due. There is no obligation of active diligen on the part of the holder to sue the acceptor or any oth party, and he may be passive and forbear to sue as long he chooses; but he must not so agree to give time to t acceptor as to preclude himself from suing him, and suspen his remedy against him in prejudice of the drawer and e dorsers. Story Prom. Notes, §§ 414, 419 and cases cite In Gould vs. Robson, 8 East, 576, the holder of a bill upc its becoming due received part payment of the acceptor an took a new bill from him at a future short date for the r mainder, and agreed to keep the original bill in his hanc as security. He now sued the defendant as endorser, an this was relied on as a defence. Lord Ellenborough saic "How can a man be said not to be injured if his means c suing be abridged by the act of another? If the plaintiff holders of the bill, had called immediately upon the defe dant for payment as soon as the bill was dishonored, the might immediately have sued the acceptor and the othe parties on the bill. The holder has the dominion of the bi at the time; he may make what arrangements he pleas with the acceptor, but he does that at his peril. If he thereb alter the situation of any other party on the bill to the pre judice of that person, he cannot afterwards proceed agains him. As to the taking part payment, no person can objec to it, because it is in aid of all the others who are liable but here he did something more—he took a new bill fror the acceptor and was to keep the original until the othe was paid. This is an agreement that in the meantime th original bill should not be enforced; such at least is the ef fect of the agreement, and therefore I think time was given. The agreement to give time must be made with a party t the bill, or it will not operate as a discharge of any.

An agreement between the creditor and the principa debtor for delay, or otherwise changing the nature of th contract to the prejudice of the surety, in order to discharg the latter, must be made upon sufficient consideration, an

binding in law upon the parties. A mere agreement by the holder with the drawee for delay, *without consideration*, though without any communication with or assent of the endorser, will not discharge the latter after his responsibility has been fixed by due notice of dishonor. McLemore vs. Powell, 12 Wheat. 554; Badnall vs. Samuel, 3 Price, 521; Eng. Exch. R. Vol. 1. So it seems that a surety will not be discharged *by the agreement* to give time, and thus vary the terms of the original promise, unless there be a consideration which will entitle the primary debtor to insist upon and enforce the agreement, and the agreement must also be made without the assent of the surety or endorser.

Whether the holder of the draft in question made or assented to the agreement set up in this case; whether he received any consideration for such agreement; whether the defendant knew of or assented to the agreement if made; whether the agent who entered into it was authorized by the plaintiff to enter into it, or whether, for the purposes of procuring and enforcing the judgment taken in New York and the terms agreed upon for the payment of it, the agent there was the agent of the plaintiff or of the defendant, or of neither of them; whether the agreement was at any time binding upon either party, are questions to be determined by the jury, under instructions from the court upon the law of the case.

The fourth error assigned is that the court erroneously instructed the jury at the request of plaintiff's attorney, especially in giving the third and fifth subdivisions of the instructions asked for, and the fifth and sixth errors assigned relate to the refusal of the court to give all and each of the instructions prayed for by defendant's counsel, (numbered 1 to 13.)

The eighth assignment of error reads as follows: The court erred in not declaring in writing his ruling upon the instructions asked for the defendant as presented, and in not marking them "given" or "refused."

We are compelled to remark here that in reference to the several instructions presented in writing by the respective counsel, if this record is perfect, the Circuit Judge failed to observe the provisions of "An act to amend the several acts relating to judicial proceedings," approved January 3, 1848, being Chapter 140 of the laws of 1847-8. The second, third and fourth sections read as follows:

"SEC. 2. Upon the presentment to the said Judge, by either of the parties or their attorneys, of instructions in writing, on the point or points of law or exceptions taken, arising on the trial, it shall be the duty of the said judge to declare, *in writing, his ruling thereupon, as presented,* and pronounce the same to the jury as *given* or *refused.*

"SEC. 3. That it shall be the duty of the said judge, in any case, when he shall refuse to give the instructions, or any one of them prayed for, as prayed to be given, to write out and declare to the jury by way of instructions his own ruling of law upon the point or points so raised or presented, all of which shall be in writing, and shall be written out before the same are delivered.

"SEC. 4. That all instructions, as well those given as those denied, and also as well those prayed or by the parties as those declared by the said judge, shall be signed and sealed by the said judge, and form a part of the record in the case."

The certificate appended to the record states that it is a true copy of the papers and records on file, &c. The body of the record shows that instructions (copied at length) were prayed by the counsel on both sides, and they are quite voluminous. Appended to many of them in the bill of exceptions is this entry: "Refused as asked for, but read with the words within the brackets interlined. To which refusal to give said instructions and to interlining the same, defendant then and there by his counsel excepts." Upon several of the instructions prayed, there is no memorandum showing that they were noticed or ruled upon at all by the judge.

The defendant excepts to the giving of several instructions asked by plaintiff's counsel, but there is no memorandum of the judge showing whether any of them were given; and it does not appear that the judge signed and sealed the charge, or any of the instructions prayed with his ruling thereon. This law of 1848 means something or nothing. If the instructions here incorporated were presented in writing to the judge, we are entitled to know what ruling was made thereon and what instructions were given thereon to the jury, and strictly we can properly know this only by the means provided by law. If they were not so presented, we cannot regard them, but they may be treated as interpolations. The bill of exceptions as signed by the judge shows that they were presented to him. The counsel and parties are interested in having the rulings of the court, as given, reviewed for the purpose of correcting material errors, and the Circuit Judge is required to write out his rulings upon each question presented, so that the exact ruling may be seen and that it may be known what portion of the paper presented is his ruling. The parties may justly complain if this is omitted, and the counsel here insists upon the strict application of the law. The question was presented to the Circuit Court upon the motion for a new trial by the defendant, which motion was overruled, thus showing that the court did not deem it essential to comply with the statute in question, and an exception was taken and noted in the record, so that the decision upon the point comes properly before the court for review. We have on several occasions passed upon cases presented, where a similar omission appeared, but, except in a single instance, no question has been raised upon it. But we are met here by the objection, and can only obey the positive requirement of the statute. For these errors, apparent in the record, the judgment must be reversed and a new trial granted.

WILLIAM SHEAR, APPELLANT, VS. COUNTY COMMISSIONERS OF COLUMBIA COUNTY.

1. Where, in a statute *changing and regulating the method* of assessment of taxes, there is a general repeal of all laws relating to assessment, it does not repeal a law prescribing *a remedy* for an illegal assessment. Section 4 of Chapter 151 of the Laws of Florida is not repealed by Section 79 of Chapter 1713 of the Laws of Florida.

2. A statute giving a remedy for an "*illegal* assessment" embraces those assessments only in which there is error in matters of law. The judgment of the County Commissioners upon a complaint for the abatement of a tax is a judicial act, in which the exercise of their discretion in fixing values cannot be revised by any other tribunal.

This is an appeal from the Third Judicial Circuit, Columbia county.

This is a petition to the Circuit Court setting forth an application to the County Commissioners of Columbia county "to meet and consider the assessment" for the purpose of State taxation made against the lands of the petitioner with a view to its reduction. The petitioner alleges that such meeting was held, and the commissioners, after hearing all the facts, with proof of the value, determined to reduce the assessment; that subsequently this action was set aside. The petition sets up facts showing an over estimate in the value, and prays an order declaring the assessment "not lawfully made."

The 4th Section of Chapter 151 of the Laws of Florida provides "that in all cases where assessments are made against any person or persons, body politic or corporate, and payment of the same may or shall be refused upon allegation of the illegality of such assessment, such person or persons, body politic or corporate, may apply to the Judge of the Circuit Court by petition, setting forth the alleged illegality, and present the same, together with the evidence to sustain it, and the judge shall decide upon the same, and if found to be illegal, shall declare the assessment not lawfully made."

The 79th Section of Chapter 1713 of the Laws of Florida, which is "An act for the assessment and collection of revenue," provides that "all acts and parts of acts heretofore passed relating to assessment and taxation, are hereby repealed.

The first question presented by the case and considered by the court is, does the 79th Section of Chapter 1713 repeal the 4th Section of Chapter 151? The next question considered is as to the power of the Circuit Court to set aside the action of the commissioners in the matter of the over valuation of the land of the petitioner. The court deems it unnecessary, in view of the conclusions reached, to express any opinion as to the effect of the enactment of the Code upon the remedy given by the 4th Section of Chapter 151, Laws of Florida.

Fleming & Daniel for Appellant.

Doby and *Niblack* for Respondents.

WESTCOTT, J., delivered the opinion of the court.

Illegal assessments—that is, assessments wherein, independent of the exercise of a discretion as to value, there appears error in matter of law—are the assessments for which a party has a remedy by petition under Section 4 of Chapter 151 of the laws of Florida. This section provides *a remedy* for an illegal assessment, without reference to the provisions of any particular act prescribing *the mode and manner* of making assessments. The 79th Section of Chapter 1713 of the Laws of Florida enacts that "all acts and parts of acts heretofore passed relating to assessment and taxation are hereby repealed." Chapter 1713 is an act prescribing the *mode and manner* of making assessments. This general clause, repealing all laws relating to assessmenss in a law changing or regulating the *method* of assessment, cannot be held to repeal laws prescribing a *remedy* for illegal assess-

ments under any and all laws. It might as well be contended that wherever a certiorari would lie to set aside an illegal assessment anterior to this law, it would not now lie to correct an illegal assessment under it.

There cannot readily be imagined an act erroneous *in point of law,* whether it be that of an executive, legislative, or judicial officer, for which there does not exist a remedy. On the other hand, the general rule is that for the erroneous exercise of either a judicial, legislative or executive *discretion,* there does not exist a remedy through the medium of judicial supervision and review. As to pure legislative and executive discretions, judicial officers cannot, as a matter of course, control them. An instance of the exercise of a pure legislative discretion is to be found in an act which the Legislature deems advisable to adopt as a remedy for a conceived evil. This remedy, however inadequate to accomplish the result desired, cannot be disregarded by a judicial tribunal, unless in conflict with organic or constitutional provisions. This is also true of executive discretions. It is doubtful even whether the Legislature could authorize judicial tribunals to review the exercise of such discretions, legislative or executive. They are discretions belonging to different departments of the government. As to judicial discretion, I conceive the rule to be that it is within the power of the Legislature to provide for the review of a discretion of this character, and that in the absence of such legislation, the exercise of a pure judicial discretion by an inferior tribunal will not be reviewed. There are perhaps exceptions to this rule, but the case at bar is not one of them. In the case of Carter vs. Bennett, 4 Fla., 356, the Supreme Court, speaking of reviewing orders of the court upon motions for new trials, based upon a consideration of the facts, remark that such practice is wholly unknown in England, and in the United States courts, and that the State courts are about equally divided thereon. In that case, this court refused to review the exercise of discretion by the Cir-

cuit Court in the matter of a motion for a new trial where the error alleged was as to conclusions of fact. This decision caused the act of 1853, (Chapter 521, Laws of Florida,) by which this court is authorized and required to review such exercise of discretion in the matter of granting new trials. Whether, in the absenee of legislation, this court or the Circuit Court can review a conclusion by the County Commissioners as to the value of land, in any form of proceeding, I think is doubtful. As to this particular case, I have no doubt. The statute invoked (Chapter 151, Laws of Florida,) provides a remedy by petition in case of an *illegal assessment*. The judgment authorized in such a proceeding is that the assessment is not *"lawfully made."* The office of a petition under this law may be compared to that of a writ of error at common law, a certiorari in the nature of a writ of error, or to the effect of a motion in arrest of judgment, in an ordinary common law case. For instance, if the proceeding of the County Commissioners was the subject of a writ of error or a certiorari in the nature of a writ of error, (a question upon which I express no opinion,) the return would be a record of the proceeding alleged to be illegal. Upon that return, no question as to an erroneous exercise of a discretion vested by the law could be raised, and the court would be restricted to the consideration of questions of law arising upon that record. There are many cases of discretion vested in County Commissioners which are not subject to review.

The petition in this case sets forth an allegal assessment, in this, that the value fixed is too high; that the "full cash value" is not the sum assessed. The issue made is as to this fact. Testimony is taken and the court determines that the value fixed by the County Commissioners is not excessive. The case, as settled by the court, contains this conclusion of fact. I think the judge went beyond the authority conferred by the statute in attempting this review of the exercise of a discretion as to *values* vested in the County Com-

missioners. I think the purpose of the petition upon its face, and its legal effect, is to seek a review of conclusions of fact rather than to correct an illegality. I do not think the petition makes a case coming within the provisions of the statute, and for this reason I think the court should have refused to act upon it. In speaking of the discretion exercised by the County Commissioners in fixing the value upon lands, the Supreme Court of Massachusetts remark:

"No judicial officer, in determining a matter legally submitted to his discretion, can ever be required to be governed by the dictates of any judgment but his own. We are clearly of opinion that in refusing to abate the petitioner's taxes, the commissioners acted judicially upon a subject of which they had final jurisdiction, and in which the exercise of their discretion cannot be revised by any other tribunal. If the commissioners erred in their proceedings in matters of law, the petitioner may have a writ of certiorari, If this will give him no adequate redress of any grievance which he may have sustained, it is the fault of the law and not of the court." 19 Pick., 299.

To the same effect are the decisions of all the State courts that we have been able to examine.

The case is remanded, with directions to dismiss the petition.

RANDALL, C. J., delivered the following concurring opinion explanatory of the opinion of the court in the case of Gwynn vs. King, 14 Fla., 32:

The opinion of the court in the case of Gwynn vs. Charles R. King, Tax Assessor, &c.,is referred to in the brief of counsel for appellant, and it is insisted that, according to that opinion, the proceeding before the Circuit Judge by petition under the act of 1847-8, was the proper mode of redress in case of a complaint against an excessive assessment. Such was not the understanding of the court in that opinion. In

that case a bill in equity was filed for the purpose of enjoining the collection of a tax, on the ground of an excessive assessment. Authorities were quoted to show that "if one is excessively taxed and omit the course provided by law for his relief, the court will not enjoin the collection for the purpose of enabling him to bring his action to settle the legality of the tax." This was the language of a case in Mississippi. It was understood that that court intended to hold that a suit in equity could not be entertained to test a question of the legality of an assessment, where the only complaint was that the assessment was excessive as to the valuation. The further remark in the case of Gwynn vs. King, to-wit: that "the 4th section of chap. 151, Laws of 1847-8, provides an ample and convenient remedy by petition to the Circuit Judge, who will examine the matter and decide upon the *lawfulness* of the assessment," was not understood to assert or admit the proposition that an excessive assessment would be treated as an unlawful assessment. It was intended merely to suggest that the act referred to had provided a convenient mode of ascertaining whether an asssessment was *lawfully* made. The whole argument in that case, as made by the court, touching the question, was that an *excessive valuation* for purposes of taxation was not an illegal assessment, and did not present a case for the interference of courts of law or equity, according to the practice and the exercise of jurisdiction by the judicial tribunals.

If it be said that our language in the case referred to might be construed to the intent that cases of *illegal* assessment included an *excessive* valuation, a reference to the statute itself must have been sufficient to show that such construction could not have been reasonably put upon it. The judgment to be given by the Circuit Judge was that the petition be dismissed, or that the assessment was "not lawfully made," if the assessment was "found to be illegal." In the case referred to the opinion of the court was, upon principle and authority, that a mere excessive valuation was not an illegal

assessment. Any other deduction from any isolated paragraph is against the whole opinion upon the subject. I must remark further, that I have doubts as to the power of this court to review, upon appeal, the determination of the Circuit Judge in this matter, and I consent to the judgment announced because the case was submitted without question as to this power, and the effect of the judgment is substantially the same upon the rights of these parties as though the appeal had been dismissed upon the determination that we could not, upon appeal, review the proceedings *had before* the Judge.

DECISIONS

OF THE

Supreme Court of Florida.

APRIL TERM, 1872.

THE STATE OF FLORIDA, RESPONDENT, VS. CHAS. H. PEARCE, APPELLANT.

1. It is not essential that an indictment should commence with the words, "The Grand Jurors of the State of Florida." It is sufficient if it commences with the words the *"jurors"* of the State of Florida, where the other entries in the record show that it was found by a grand jury.

2. The record of a judgment in a criminal case contains this entry, showing the swearing of the petit jury: "Thereupon came a jury, to-wit, (naming twelve persons) who being elected, tried, and sworn the truth to speak upon the issue joined." Following the indictment and plea is also this entry: "The jury was duly impanneled and sworn to try the issue." *Held*: That this is sufficient to show that the jury were properly sworn in accordance with the statute, to "well and truly try the issue between the State of Florida and the defendant, according to the evidence."

3. Section 7 of chapter 6 of "An Act to Provide for the Punishment of Crime and Proceedings in Criminal Cases," provides that whoever corruptly gives, offers, or promises to any executive, legislative, or judicial officer, after his election or appointment, either before or after he is qualified or has taken his seat, any gift or gratuity whatever, with intent to influence his act, vote, opinion, decision or judgment in any matter, question, cause, or proceeding which may be then pending, or may by law come or be brought before him in his official capacity, shall be punished, &c. An indictment charging a corrupt offer to H., a member of the House of Assembly of the State of Florida, and representing the county of Gadsden as one of the representatives there-

of, need not in addjtion contain the words, "the said Hill then and there being a legislative officer of the State of Florida," or other words to that effect. That the party is a legislative officer is a necessary legal conclusion from the facts set up. The special matter of this whole fact (that he is a legislative officer) is set forth in the indictment with such certainty that the offence judicially appears to the court. This is sufficient.

Appeal from the Circuit Court for Leon county, Second Judicial Circuit.

A statement of the case is contained in the opinion of the court.

Bolling Baker and *J. B. C. Drew* for Appellant.

A. L. Woodward, Sr., for Respondent.

WESTCOTT, J., delivered the opinion of the court.

This is an indictment for corruptly offering a sum of money to a legislative officer of the State of Florida, with intent to influence his act and vote upon a matter then pending before him. Upon the rendition of a verdict of guilty, the defendant moved an arrest of judgment upon the following grounds:

First—That there was no indictment or presentment by the grand jury as required by the constitution and laws of this State.

Second—That the indictment charges no crime or offence under the laws of this State.

This motion was overruled, the defendant excepted and entered an appeal to this court.

The errors assigned here are, that the court erred in overruling the motion to arrest the judgment and that the record of the conviction "discloses the fact that the jurors who tried the case in the court below were not sworn as jurors in this case."

We will examine the questions thus presented in the following order: Does this record disclose an indictment by

the grand jury? Does it show that the jurors were not sworn as jurors in the case? Does the indictment charge a crime or offence under the laws of this State?

The record of the conviction, so far as it is necessary to be considered in connection with the first question, is as follows:

After stating the name, style and term of the court, we have the following entries:

"The following persons were sworn according to law as a grand jury for the body of the county of Leon." Here follow the names of the jurors. "Ordered that Joseph John Williams be and he is hereby appointed foreman of the grand jury." "The grand jury came into court and made the following presentment:

"The State of Florida, vs. Charles H. Pearce. } Indictment for bribery found at the Fall Term, 1870. A true bill.

Jos. J. WILLIAMS, Foreman."

Following this entry in the record is found an indictment against the defendant endorsed "a true bill," by the foreman of the grand jury.

The precise objection urged is that the word "jurors," in the commencement of the indictment, is insufficient, and that it is a fatal defect if the indictment does not commence with the words "grand jurors." This record contains, as we have seen, the name and style of the court where the indictment was found; the names of the persons composing the grand jury for the term of the court at which it was found; the making of a presentment against the defendant through this particular indictment by the grand jury, and the indictment itself endorsed "a true bill" by the person who is shown by the record to have been appointed foreman of the grand jury. This record, therefore, shows that this particular indictment was found by the grand jury. Independent of this, however, the commencement of the indictment in this case is similar to that used in England for years at a time when the practice of the courts was much more technical and strict

than it is now. This form is the one now in use in courts of criminal jurisdiction in that country. The old practice for centuries was to bring the indictment, drawn up at large in Latin and engrossed, to the grand jury to find, and it always commenced with the words, *"juratores pro domina regina presentant quod," etc.* This form for the commencement of an indictment has obtained, too, for years in most of the States of the Union. Mr. Bishop, in his work on Criminal Procedure, says the whole question as to what a caption should contain "appears, when approached through the American books, draped in mist and girded about with darkness."

It may also be said that there is great variety and difference in the views of the courts of the several States as to what entries or statements in a record are sufficient to show the judicial history of a conviction. From these two causes arise the great variety of opinion which is found in the books upon questions of like character to the one now under consideration. The safe rule is to follow the English precedents, modified to conform to differences in the judicial structure of the two countries. The case of the People vs. Bennett, 37 N. Y., 13, presents an adjudication upon this question.

The part of the indictment which was there complained of as defective was as follows:

"Court of Sessions, } Courtland Co., S. S.
"Courtland County. }

"The jurors of the people of the State of New York, in and for the body of the county of Courtland, upon their oaths present."

The objection was that it did not appear on the face of the indictment that it was found by a grand jury. The court say that "observing the proper distinction between the caption and the commencement of an indictment, no valid objection can be found to the one in this case. The caption is no part of the indictment. It consists wholly of the history of the proceedings when an indictment is re-

moved from an inferior to a superior court. The form of an indictment in most of our States, which form is derived from England, is thus: 'The jurors of the people of the State of ————, in and for the body of the county of ————, upon their oaths present.' &c. This is the commencement of 'the indictment and all that it need contain.' The commencement of the indictment in this case is correct, and the record entries contain all the facts which a caption should state. If there is an indictment good upon its face on the files of the court, and the party is about to be arraigned upon it, and desires to object that it is found in an improper manner or by an insufficient number of grand jurors, the way is open for redress by motion." 9 Cox C. C., 433, 436; 10 Jurist, N. S., 724; 32 Black., 238; Bish. C. P., 448.

When an indictment properly endorsed a true bill is thus found upon the files, we think the legal presumption is that it is there properly, and that the defendant should be required to take affirmative action setting up the contrary to be the truth. The legal presumption must be that an indictment properly endorsed a true bill by the person whom the records of the term at which it was found show was the foreman of the grand jury, was so found by the grand jury, as the law makes it the duty of the foreman to make such an endorsement only in that event. 13 Fla., 669.

The next question arising upon this record and the assignment of errors is, does the record disclose "that the jurors were not sworn as jurors in this case?" This question was not raised in the Circuit Court, and it is insisted that there is no action to be reviewed here. As we think there is no error, there can be no impropriety in deciding the point. The oath prescribed for the jury by the statute, in all cases not capital, is, "you shall well and truly try the issue between the State of Florida and the defendant according to the evidence, so help you God." The first entry in this record concerning the swearing of the jury is as follows: "Thereupon came a jury, to-wit: (naming 12 persons,) who

being elected, tried and sworn the truth to speak upon the issue joined," &c. Another entry in reference to the same matter is as follows: "And afterwards, to-wit: on the 13th day of December, A. D. 1870, a jury was duly impannelled and sworn to try the issue between the State of Florida upon the one part and the prisoner at the bar on the other part." We have sought diligently to find some American cases covering the point. As is usual in questions of this character, they are conflicting. In 10 Ohio State, 578, we find this decision: "The record of a judgment in a criminal case which shows that the jury upon being impannelled and sworn the truth to speak upon the issue joined between the parties, and after having heard the evidence and charge of the court, upon their oaths did say that the defendant is guilty as charged, is sufficient without the addition of the words 'according to the law and the evidence,' in connection with the oath to 'render a verdict on the issue joined.'"

In 2 Eng., (Ark.) the defendant was convicted of murder. The record of the conviction stated that the jury "were selected, chosen and sworn to say the truth in the premises," and the cause submitted to them, &c. The court say, "In all criminal prosecutions under our constitution and laws, the jury are the judges both of the law and the evidence, and as a necessary consequence should be sworn to decide according to both. It is perfectly manifest that the swearing in this case is wholly insufficient."

In 5 Eng. (Ark.) a later case in the same State, the entry of record was, "and thereupon to try the issue joined in this case comes a jury, to-wit: A., B., &c., &c., twelve good and lawful men of the county, who were elected, tried and sworn to try the issue joined in this case." The court say the record shows that the jury were sworn only "to try the issue joined. This was irregular. They should also have been sworn to give a true verdict according to the law and the evidence. Had it been stated on the record that the

jury were duly or regularly sworn, we would have presumed that the oath had been properly administered."

The record now before this court is sufficient if we follow the case in Ohio, and it is likewise within the rule of the last decision in Arkansas. The entry which follows the indictment in this case is that *"the jury was duly impannelled and sworn to try the issue,"* &c. We cannot, however, thus leave this point, as in our opinion these cases announce the rule too strictly. The record of an indictment and conviction need not set forth the oath to the jury in the precise words in which it is administered; nor is it absolutely essential that such words as that the jury were "duly or legally sworn," should be in the record. It is no more necessary to set forth the oath of the jury which determines the issues raised by the pleadings, than it is to set forth the oath administered to the grand jury which finds the indictment. It is necessary that each should act under oath. The entry which, according to the accepted English forms, is sufficient to show that the proper oaths were administered, is this as to the grand jury: "Be it remembered that by the oaths of A., B., C., D., (and so on naming the grand jurors,) good and lawful men of the county aforesaid, then and there impannelled, sworn and charged to inquire for the said lord the King, and for the body of said county," &c. As to the petit jury, and the jurors for this purpose impannelled and returned, to-wit: (naming them,) being called, came, who being elected, tried and *sworn to speak the truth of and concerning the premises,* upon their oath say, &c. Thus we see that the simple statement by way of narrating the history of the conviction that "the jury were elected, tried and sworn to speak the truth of and concerning the premises," is sufficient. With such an entry, the legal presumption is that the proper oath was administered. Appendix to 4 Black. Com.; 3 Lord Raymond, 36, 51. We think that either of the statements in this record made by way of narrating the history of the trial and conviction is sufficient.

The last question raised in this case is: Does the indictr charge an offence known to the laws of the State of Flor The section of the statute under which it is framed is as fol "Whoever corruptly gives, offers or promises to any ex tive, legislative or judicial officer, after his election or pointment, either before or after he has qualified and t his seat, any gift or gratuity whatever, with intent to i ence his act, vote, opinion, decision or judgment, on matter, question, cause or proceeding which may be pending or may by law come or be brought before him i official capacity, shall be punished," &c.

The language of the indictment is as follows: " jurors of the State of Florida, in and for the body of county of Leon, upon their oaths present: That Charle Pearce, colored, a minister of the gospel, and a Senator resenting the Eighth District in the Senate of the Stat Florida, and late of the county of Leon aforesaid, in the cuit and State aforesaid, on the fourth day of Februar the year of our Lord one thousand eight hundred and seve with force and arms at and in the county of Leon afore in the Circuit and State aforesaid, during the pendency be the house of Assembly of the State of Florida, at its reg session of 1870, of a certain resolution to impeach one I rison Reed, Governor of the State of Florida, of high cr and misdemeanors, with the purpose and intent of fra lently and feloniously influencing the act and vote of F erick Hill, a member of said house of Assembly and re senting the county of Gadsden as one of the representa thereof, and to fraudulently induce the said Frederick in his official capacity as a member of said house of As bly, to vote against said resolution of impeachment, then and there corruptly offer and promise to the said F erick Hill, member as aforesaid, the sum of five hun dollars, against the form," &c. The objection urged tc indictment is that it does not set forth all the material and circumstances which the prosecution is bound to p

in order to procure a conviction; that the most material fact to be proven under the statute in this case is that the offer was made to an executive, legislative or judicial officer, and it is not alleged in the indictment that the person to whom the offer was made was either. The rule stated is no doubt correct, but we think there is in this case an erroneous application of it. Applying this rule to the indictment under consideration, we have no doubt of its efficiency. A critical and careful examination will show that all and every fact or act necessary to make out the crime which the statute creates is set forth in the indictment. The fact charged is that a corrupt offer of a sum of money was made to Frederick Hill, a member of the house of Assembly of the State of Florida, representing the county of Gadsden as one of the representatives thereof. Now if a member of the house of Assembly of the State of Florida is a legislative officer within the meaning of the act, and of this we have no doubt, the fact constituting the crime in this respect is sufficiently stated, and what is omitted to be stated is only a necessary legal conclusion from the special facts stated. The statute in general terms provides a punishment for a corrupt offer, &c., to a *legislative, executive or judicial officer,* with intent, &c. This is the whole fact, and the general and safe rule is that *"the special matter of this whole fact should be set forth in the indictment with such certainty that the offense may judicially appear to the court."*

Here the acts and facts are set forth in the precise language of the statute, except where that language involves a legal conclusion following from particular facts. In that case, the particular facts from which that conclusion follows are stated. It would not be necessary under this statute, in charging an offer to a judicial officer, after setting forth that he was the judge of a judicial district of the State of Florida, (naming such district,) to allege as matter of fact that he was a judicial officer. Now the term House, with reference to the legislative department of the government, is used in the Con-

stitution repeatedly as signifying the Senate and As respectively. The allegation that the party was a of the house of Assembly of the State of Florida scription of the particular house of the Legislature t he belonged. Not only is this true, but the ind alleges further that he was a representative of the of Gadsden.

We think it *"clearly appears from the facts paten record that a specific, legally defined crime is charg requisite certainty."* As a general rule, it is both ins and unnecessary to charge a legal conclusion.

The judgment and sentence are affirmed.

O. B. HART, ET AL., APPELLANTS, VS. W. M. BOSTWI WIFE, RESPONDENTS.

1. In an action to recover the possession of real estate, the defendan swered that the action was not instituted within seven years after the cause of action accrued, excluding the period of time be the 10th day of January, 1861, and the 25th day of October, 1865. third section of an act providing for the stay of executions, ap December 13, 1861, enacted that "the statutes of limitation n force in this State in relation to civil actions of every descriptic and the same are hereby suspended, and shall have no operati effect so long as this act may continue in force and unrepe *Held*, That the plea was bad for the reason that this law susp the statutes of limitation was in force and unrepealed, and that has not been any law in operation limiting the time for comm civil actions since the date of its passage.

2. Prior to January 8, 1848, the statute limited the time for comm an action for the recovery of the possession of lands to twenty from the accruing of the cause of action. At that date, the tin commencing the action was changed by law to seven years; *ded*, The act should not operate retrospectively, but from its app

that the former statute should control until the expiration of seven years from such approval, and not afterwards. The plaintiffs requested the judge to charge the jury that if they should find "that the deed under which defendant claims color of title bears date prior to the 8th day of January, 1848, the defendants must prove an adverse possession of twenty years in order to constitute a bar under the statutes." The court refused the instruction and charged that the statutory period was seven years: *Held*, That the judge ruled correctly in refusing the instruction. If the period of twenty years of adverse possession elapsed before the expiration of seven years from the 8th of January, 1848, the action was barred under the former statute; otherwise, it was barred upon the expiration of seven years after that date. That inchoate rights, depending for their existence upon the statute itself, are subject to be abridged or modified by law, and a statute of limitation may be changed with reference to existing rights, provided a reasonable time is given, after the change and before it would operate as a bar, to exercise the right or to commence suit.

3. A paper purporting to convey a title of real estate, dated July 24, 1823, acknowledging payment of purchase money and signed, but not sealed, did not convey an estate of inheritance. An act regulating conveyances, approved August 31, 1822, declared that no estate of inheritance or freehold for more than two years should be conveyed except by writing, sealed and delivered.

4. If, on an agreement to sell lands, the consideration is paid, and the owner consents that the buyer may enter and hold the land as his own, such entry and possession cannot be deemed subordinate to the title of the seller, but is adverse, and a disseisin.

5. Where one agrees to buy and another to sell land, and the consideration is not paid, and the party contracting to buy enters into possession, inasmuch as the fair inference is that the entry and possession are in subordination to the title of the seller until the stipulated payment is made, such entry and possession are not adverse; and until payment, or until the party in possession repudiates the seller's title and asserts his own, with knowledge of such assertion brought home to the seller, the statute of limitations does not begin to run.

6. An order of the Judge of the County Court, dated March 18th, 1828, revoking letters and removing one from the office of administrator "for maladministration practiced by the administrator," was offered in evidence and objected to on the ground that the revocation was made for causes other than those provided by statute: *Held*, That as the order was duly entered of record and not reversed or set aside, it was operative, although granted irregularly or upon insufficient grounds, and was properly received in evidence for the purpose of showing such revocation and removal.

7. A "difficult and extraordinary case," within the meaning of Section 254 of the Code, to authorize a further allowance of costs, must be a case beset by more than the ordinary difficulties of litigation and necessarily justifying or requiring more than ordinary expenditures of money and labor. Before making an order for a further allowance, the court should determine judicially upon facts presented that the case is "difficult and extraordinary," and this being determined, it is within the discretion of the court to make the further allowance or not. The amount allowed should not exceed a sum, to be ascertained upon facts appearing on the application, to be necessary to indemnify the prevailing party for his expenses in the action, and cannot exceed five per cent. upon the amount of the recovery or claim or subject matter involved.

8. An order making a further allowance in the nature of costs to the prevailing party may be reviewed upon appeal from the judgment entered therefor, for the purpose of ascertaining whether the case is one in which such allowance may lawfully be made, and whether the sum allowed is within that authorized by law; but the Supreme Court will not interfere with the exercise of discretion in making the order for such allowance, or as to the amount allowed, unless it exceeds the amount authorizd by law.

This is an appeal from the Fourth Judicial Circuit—Duval County.

The complaint alleges that plaintiffs are the owners of 640 acres of land near Jacksonville; that defendants are in possession and withhold the possession; demand judgment for the possession. $10,000 damages and costs.

1. The answer denies that plaintiffs are the owners or entitled to the possession.

2. Defendants allege that the action was not instituted within seven years next after the cause of action accrued, excluding in the computation of said seven years the period of time between the 10th of January, 1861, and the 25th of October, 1865.

The plaintiffs demurred to the second defence set up in the answer for insufficiency, in not stating facts sufficient to constitute a defence, which demurrer was overruled by the court.

The plaintiffs then replied to the answer as follows:

1. That the said pretended adverse possession of the defendants commenced, if at all, prior to the 8th day of January, 1848, and did not continue twenty years, exclusive of the period from the 10th day of January, 1861, to the 25th day of October, 1865, as required by the act of November 10th, 1828.

2. That Thomas G. Saunders, under whom defendants claim color of title to said lands, entered upon the same under a contract of sale with plaintiff's ancestor, Isaiah D. Hart, now deceased, which was never executed, and the defendants claiming under said Saunders are thereby estopped from setting up a possession adverse to that of the plaintiffs.

The defendants then moved the court to strike out the reply of the plaintiffs, on the ground that the matters therein are improperly pleaded.

This motion was granted and the cause was tried before a jury.

Plaintiffs offered in evidence the following deeds: Isaiah D. Hart, Administrator *ex officio* of William G. Dawson, deceased, to John Warren, his heirs and assigns, dated February 3, 1829, recorded on the same day; John Warren to Isaiah D. Hart, his heirs and assigns, dated 25th October, 1829, recorded on the same day. These deeds were received and given in evidence to the jury.

Plaintiffs also offered a deed from Francis Richard, Administrator of John R. Hogans, deceased, to Isaiah D. Hart, dated October 13, 1831, and recorded the same day, which was objected to by the defendants and the objection sustained; but was again offered by plaintiffs, after the closing of defendants' testimony, and read without objection. This is a deed of "bargain, sale and quit-claim" to I. D. Hart, without naming his heirs or assigns, and has this memorandum at the bottom, after the names of the witnesses: "N. B.—The above tract of land was conveyed by John R. Hogans, deceased, by a deed bearing date the 24th July, 1823,

to William G. Dawson, from whom I. D. Hart claims title. (Signed) F. RICHARD. [L. S.]"

The plaintiffs also offered in evidence, for the purpose of showing title in William G. Dawson, a paper purporting to be a conveyance of the property in question, signed by Jno. R. Hogans, whereby, in consideration of twenty-five dollars paid, he did "bargain, sell and quit claim unto William G. Dawson, and to his heirs and assigns forever, all my right, title, interest, estate, claim and demand, both at law and in equity, and as well in possession as in expectancy, of, in and to" the lands described, and concludes thus: "In witness whereof, I have set my hand *and seal* this 24th day of July, 1823;" signed by John R. Hogans, but without seal, and attested by one witness. It was not proved or acknowledged, but was recorded February 3, 1829. Objection being made by the defendants' counsel, the paper was rejected by the court, and the ruling of the court excepted to by plaintiffs. (After the defendants had introduced their testimony and rested, this paper was again offered by plaintiffs as a contract of sale, which was executed by F. Richard, Administrator of John R. Hogans, by a deed executed by him to Isaiah D. Hart. Under objection by defendants, the court refused to receive the paper in evidence, which ruling was excepted to by plaintiffs.)

It was agreed and admitted by the parties that the plaintiffs were the devisees under the will of I. D. Hart, deceased, and that the defendants were in possession of the lands in controversy.

George Wingate testified in behalf of the plaintiffs that he rented the premises from I. D. Hart early in 1846, and Hart put him in possession, and about three months afterwards, Hart told him that he had sold the land and wanted to give possession; that he did not give the name of the purchaser, but a man by the name of Saunders went into possession shortly after and lived there.

This is the substance of the case made by the plaintiffs.

The defendants introduced a certified copy of a deed executed by Thomas G. Saunders and wife to Adeline Jones, dated September 9, 1847, describing the land in question. Also, a deed of Thomas W. Jones and Adeline, his wife, to E. A. DeCottes, dated August 4th, 1849, covering fifty acres, together with a map of the whole tract. Also, testimony to show that Eliza Bostwick, one of the defendants, was the daughter and heir-at-law of Thomas W. Jones and Adeline Jones. Also, a certified copy of letters granted by the Court of Probate of Duval county to Washington N. Dawson, as Administrator of the estate of William G. Dawson, deceased, dated November 30, 1826. This was objected to on the ground that the defendants' testimony shows that they claim to derive title under Isaiah D. Hart, and therefore they cannot introduce testimony the object of which is to attack the title of said Hart. Defendants deny that they claim to derive their title under Hart. The court admitted the evidence and plaintiffs excepted.

Defendants also introduced Volume 3, United States Statutes at large, containing the act of Congress authorizing the appointment of three commissioners to examine and decide upon claims to lands, in pursuance of Article IX of the Treaty with Spain. Defendants also offered Volume 4, American State Papers, (717) to show that the commissioners reported favorably upon the claim of John R. Hogans to 640 acres under the Donation Act. This was objected to, but received by the court and exception noted. Defendants also offered the United States Statutes at large, Volume 4, Chapter 9, (202) confirming the report of the commissioners. Objected to, but received by the court and excepted to by plaintiffs. Further oral testimony was introduced by defendants, and they rested their case.

The plaintiffs then resumed, and offered in rebuttal a certified copy of an order of the Judge of the County Court of Duval county, dated March 12, 1828, revoking the letters granted to Washington N. Dawson, as Administrator

of the estate of William G. Dawson, deceased, "for maladministration practiced by the administrator," &c. The defendants' counsel objected to the introduction of the paper, and the court overruled the objection and received the evidence. Excepted to by defendants. Plaintiffs introduced an order of the Probate Court directing the clerk to make sale of the real estate of William G. Dawson to pay debts, &c., dated November 17, 1828. This was objected to, but received in evidence by the court, to which ruling defendants excepted. The plaintiffs then offered the paper before mentioned, signed by John R. Hogans, purporting to convey the premises (but without seal) to William G. Dawson, which was rejected by the court, as above stated. Also, the deed of F. Richard, Administrator of Hogans, to I. D. Hart, before referred to, and the same was read in evidence.

The cause was then submitted.

The court charged the jury as follows: This is an action brought by Hart to recover a tract of land known as the Hogans' Tract. To which action an answer has been filed and the plea of the statute of limitations.

To entitle the plaintiff to recover, he must show good title himself, and cannot rely upon the weakness of his opponent's.

If the defendant was in adverse possession, and controlled the premises, he has constructive possession until evicted by law or dispossessed by the parties.

If the statute of limitations commenced running, you are to deduct from 10th January, 1861, to October 25th, 1865, then and there add the period it ran before 10th January, 1861, to it, and if you find seven years peaceable possession, undisputed under color of title, you will find for defendant. T. T. Long, Judge.

Plaintiffs excepted to the charge.

Counsel for the respective parties submitted to the court written instructions, to be given to the jury, which are noticed in the opinion of the court.

A verdict was rendered for defendants. The court refused a new trial, and plaintiffs appealed. Errors assigned by the appellants:

1. That the court erred in overruling the demurrer.
2. In refusing to allow the bill of sale or deed from John R. Hogans to William G. Dawson to be read in evidence.
3. In allowing the appointment of Washington N. Dawson, as Administrator of the estate of William G. Dawson, to be read in evidence.
4. In other rulings on the testimony against plaintiffs.
5. In the second and third charges to the jury.
6. In charging the jury, as requested by defendants' counsel, in charges numbered 1 to 13 inclusive.
7. In refusing to give the charges numbered 1,3,4,6,7,11, 13, 14, respectively, as asked for by plaintiffs' counsel, and in giving the said charges as modified by the court.
8. In refusing to grant the motion for a new trial.
9. In granting the additional allowance of costs under Section 254 of the Code.
10. In the amount of the allowance so made.

Fleming & Daniel for Appellants.

E. M. L'Engle for Respondents.

RANDALL, C. J., delivered the opinion of the court.

This was an action commenced by the appellants to recover the possession of certain lands. The appellants assign, for error, first, that the court overruled their demurrer to the second ground of defence set up in the defendants' answer, which alleged that the action "was not instituted within seven years next after the said cause of action accrued, excluding the period of time between the tenth day of January, A. D. 1861, and the 25th day of October, 1865." The plaintiffs demurred to this portion of the answer for insufficiency,

and the court overruled the demurrer. The plaintiffs th filed a replication to the answer which was struck out by t court. The effect of the replication was that the plaintif abandoned all benefit of exception to the judgment ove ruling the demurrer, and therefore they cannot assign th for error. The Judge, however, in his charge instructed t jury in effect that the matter set up in the answer in th respect constituted a defence, and the plaintiffs having e cepted to the charge and assigned it as error, it will be co sidered first.

According to the form of this answer, the term of sev years is comprised of a period of time prior to January 1 1861, together with a term subsequent to October 25, 186 and the question is presented whether there is, or has be since October 26, 1865, a statute in force limiting the tin for the commencing of civil actions.

It is evident that the pleader had in his mind in framir this answer the third section of Article XV of the Const tution of 1868, which provides "that all laws of the Sta passed by the so-called General Assembly since the 10 day of January. A. D. 1861, not conflicting with the wo or spirit of the Constitution and laws of the United State or with this Constitution, shall be valid. * * * Provided, that unless otherwise provided in this Constit tion, the statute of limitations shall not be pleaded upon ar *claim* in the hands of any person for the period of time b tween the 10th day of January, 1861, and the 25th day October, 1865, whether proceedings at law had been con menced before the 25th day of October, 1865, or not."- Whether this provision of the Constitution is applicable the present case or not, the defendants do not claim t benefit of the time between the dates mentioned in the a swer; but they do claim that the period of time since t 25th of October, 1865, should be computed, and that by i cluding this period, the full term of seven years has elapse since the plaintiffs' cause of action accrued, and that therefo

the action is barred under the first and second sections of "an act to amend the several acts concerning the limitation of actions," approved January 8, 1848.

If any statute limiting the time for the commencement of civil actions was in operation after the 25th day of October, 1865, it was proper to compute the time elapsed since that period, but if there was no such statute in force this time should not be computed.

The act of 1848 (chapter 142) provided that an action for the recovery or possession of real estate shall be brought within seven years next after the right or title thereto, or cause of such action shall accrue, and not afterwards.

The third section of an act providing for the stay of executions, approved Dec. 13, 1861, (chapter 1271,) says that "the statutes of limitation now in force in this State, in relation to civil actions of every description, be and the same are hereby suspended, and shall have no operation or effect so long as this act may continue in force and unrepealed, reserving all rights and defences under the existing statutes of limitation; *provided however,* that nothing in this act shall be construed so as to prevent any defendant from pleading said statute or statutes of limitation in any cause wherein the same shall have run before the passage of this act."

It was contended upon the argument that this act of Dec. 13, 1861, had been declared unconstitutional and void in the case of Garlington vs. Priest, (13 Fla. 559,) but it will be seen that that case came under the first section of the act, which related to an entirely different subject. It was deemed that the first section was in conflict with the spirit of the Constitution of the United States, and with the existence of the union of the States, and, therefore, void from the beginning; but there is nothing in the third section making it liable to such objection. It does not follow that because one or more sections of a law may be inoperative or void, the whole act is therefore void, and we cannot so hold in reference to the third section; and as there seems to be no

valid objection to the operation of the latter, it is consid as in force from the time of its approval to the present, less it has been repealed. It is urged that it is repeale the effect of the proviso to the third section of Article of the Constitution of 1868, before cited. We do not t so. This clause of the Constitution does not expressly peal it, nor does it operate as a repeal by implication. expressly ratifies all laws passed "since the 10th of Janu 1861, not conflicting with the word or spirit of the Cons tion and laws of the United States or with this Cons tion;" and the proviso enacts that "unless otherwise pr ded in this Constitution, the statute of limitations shall be pleaded upon any *claim* in the hands of any person, as to include the period of time between January 10, 1 and October 25, 1865. The act of December 13, 1861 fers to the time of commencing "civil actions" of every cription. This section of the Constitution relates to pl ing the statutes of limitation upon "claims in the hand any person" from a period *anterior* to the passage of the of 1861, down to October 25, 1865. Whether this cons tional provision is intended to embrace the claim of titl the possession of real property, it is not necessary her determine; but it is certain that the act of December 1861, does embrace it, and suspends the operation of statutes of limitation with regard to the commencemen all civil actions. This act has not been repealed by any of the legislature. or by force of the Constitution of 1 and is therefore in force. Its effect is to prevent pa from pleading the lapse of time, occurring after its appr as a defence in any civil action, and it saves such def where the time had fully elapsed before its approval.

The necessary conclusion is, that the second answer o defendants does not set up a defence under the statute, that the charge of the court in that respect was errone

2. The second ground of error alleged is that the cour fused to allow the bill of sale or deed from John R. Ho

to Wm. G. Dawson to be read in evidence. From the statement of the case it will be seen that this paper, although purporting in terms to convey all the title and interest of Hogans, either in possession or expectancy, and to acknowledge payment of the consideration therefor, was without a seal. It was contended that this was a good conveyance under the civil law, as it is claimed that it was executed and delivered before the adoption of the common law in Florida. The date of the paper was July 24, 1823. The common law of England and the statutes in aid thereof, down to the 4th year of James I.; was adopted by the Legislature of Florida on the second day of September, 1822, to take effect in East Florida Oct. 1, 1822. (Laws of 1822, p. 53.) Again, the common and statute laws of England were enacted by the Legislature June 29, 1823, by the statute now found in Thompson's Dig., 21. (See laws of 1823, p. 11.) By an act regulating conveyances approved August 31, 1822, (Laws of 1822 p. 49,) it was declared that no estate of inheritance or freehold for a term of more than two years should be conveyed, "unless the conveyance be declared in writing, *sealed* and delivered." The paper presented lacked a seal and therefore, under the statute, no estate of inheritance passed by the writing alone, and it was properly rejected by the court.

3. The plaintiffs allege that the court erred in allowing the appointment of W. N. Dawson as administrator of W. G. Dawson to be read in evidence. This was doubtless offered for the purpose of showing that the deed offered by the plaintiffs from I. D. Hart, clerk, &c., administrator ex-officio of W. G. Dawson, was without authority of law, because another had been duly appointed. As the grounds of the authority of I. D. Hart, as clerk and ex-officio administrator, had not been shown on the part of the plaintiffs, it was competent for the defendants to show that another was in fact duly authorized and acting as administrator, and hence that Hart as administrator ex-officio had no authority

to convey. For this purpose there was no valid o to giving the appointment of W. N. Dawson in e After the close of the defendants' testimony, the p offered an order of the judge of the county cour March 12, 1828, removing W. N. Dawson from the administrator of W. G. Dawson, and another orde November 17, 1828, directing the clerk to make sal real estate, &c. These were objected to by defendant sel on the ground that the order removing W. N. I upon the grounds stated, was unauthorized, the grou ing for "mal-administration practised by the adm tor," &c., whereas the statute only authorized a rem the Judge for other causes; and the objection to the order was, that it was granted before the statute autl the clerk to act as administrator ex-officio was pas wit: November 20, 1828.

We are of the opinion that the order removing Dawson, as administrator, having been entered of and not subsequently reversed or set aside, although have been granted upon insufficient grounds, must and we find by an examination of the laws that the ac Legislature constituting the clerk administrator ex-of case of a vacancy, (as by revocation of letter, &c., "an act in addition to an act respecting the probate and the granting of letters testamentary and letters ministration, and the duties of executors, administrat guardians," was approved December 5, 1825, (se 1825, p. 28,) and not in 1828 as was insisted by coun was in force at the time of the granting of the order

5. The fifth error assigned is that the court erre second and third charge to the jury.

The second paragraph of the charge is exceedingly nite, and we are unable to determine its effect upon th of jurors. The third paragraph referred to, relating computation of time under the statute of limitations,

ready been commented upon in considering the first of the errors assigned.

6. The sixth error assigned is that the Judge charged the jury as requested by defendants' counsel in the instructions numbered 1 to 13, inclusive.

It is unnecessary to repeat and notice them in detail. The several propositions of law embraced in them appear to have been collated from approved authorities, excepting such portions as relate to the computation of time in applying the statute of limitations, as already noticed. Beyond this, even if they were not all strictly applicable to the facts of this case, (as was insisted,) we discover in them nothing which tends to embarrass the case or to mislead or confuse a jury.

7. The seventh error assigned is as follows: "The court erred in refusing to give the charges numbered 1, 3, 4, 6, 7, 11, 13 and 14, respectively, as asked for by plaintiffs' counsel, and in giving the said charges as modified by the court."

The several instructions prayed by plaintiffs, here mentioned, are correct, so far as we discover, except as will be presently noticed.

The first proposition was correctly stated by plaintiffs' counsel. The words appended by the court are too indefinite and imperfect to give the jury a clear understanding of the law.

The third proposition was also correct. The words added by the court are not applicable to the proposition, and are not material. However, it is not probable that they had any influence against the plaintiffs.

The fourth instruction prayed was as follows: "If the defendants have failed to prove an actual occupation of a part of the lands in controversy, inclosed by a substantial fence, or in some equally notorious way, continuously and without interruption for the entire period prescribed by the statute of limitations, the *plaintiffs' right of entry* is not barred, and you should find accordingly, and an interval of

a month, a week, or even a day is sufficient to prevent that continuity of possession which is essential to a defence under the statute of limitations." This, as it was preceded and qualified by the suggestion that the jury must first find that the plaintiffs had established their right, should have been given, and the Judge committed an error in refusing this instruction as prayed, and by adding, "If you find that Jones *never* was in possession, the court charges that the charge asked for is law; but if you find that Jones was in actual passession, used it, rented or leased, then he is constructively in possession *the whole time.*" This seems to suggest that if "Jones" was *ever* in possession, then he was constructively in possession during the *entire* period of limitation. The views of the Judge are not sufficiently clear and the jury may have been misled.

As to the sixth instruction and the words added to it by the Judge, taken together, it is entirely indefinite and tends to confusion.

The seventh instruction is in substance, that an actual interruption of the possession is fatal to the claim, (of adverse possession,) to which the court added, "if the possession is interrupted by adverse possession it is fatal;" thus limiting and confining the interruption of the possession of the defendants to an interruption by an actual possession adverse to that of the defendant. It must be seen at a glance that this is not correct. The interruption may have been by abandonment and various other causes, and the lands may not have been occupied at all for a long period, which may have broken the defendants' claim, and deprived the plaintiffs of an antagonist against whom they might have proceeded to enforce their rights.

The 11th instruction prayed by the defendants is as follows: "If you find from the evidence that the party from whom the defendants or their ancestor, Thomas Jones, derived their claim of title, entered upon the lands, in controversy, under a contract of sale with the plaintiffs' ancestor,

Isaiah D. Hart, and that said contract is not proven to have been executed, the defendants are estopped from setting up their possession as adverse, and you should find for the plaintiffs."

An adverse possession must be a possession inconsistent with the title of the claimant. If, on an agreement to sell lands, the consideration is *paid*, and the owner consents that the buyer may enter and hold the land as his own, the entry and possession of the buyer cannot be deemed subordinated to the title of the seller, but as adverse and a disseisin. Brown vs. King, 5 Met. Mass., 173; Ellison vs. Cathcart, 1 McMullan, S. C., 5; Drew vs. Towle, 10 Foster, N. H., 531; Paxson vs. Bailey, 17 Ga., 600; 12 Texas, 195; 1 Sneed. 586; 8 Cow., 589; 14 Wend., 227; 14 Barbour, 441.

But the case is different where one agrees to buy and another agrees to sell land and the consideration is not paid, and the party contracting to buy enters into possession inasmuch as the fair inference then is, that the entry and possession are in subordination to the title of the party contracting to sell, until the stipulated payment is made. Such a case, therefore, constitutes a tenancy at will, or a trust, rather than a disseisin. Angell on Limitations, Sec. 406, and cases cited above.

In Maryland it has been held that where a contract for the sale of land is proved, and a uniform possession of part under it, length of time is no bar to a specific performance being decreed. Somerville vs. Trueman, 4 Har. and McHen., 43; also 18 Vermont, 229; 3 McLean, (U. S.,) 457; 1 Harr. Del., 336.

In New York, a lapse of thirty years or, it seems of twenty years, will authorize a jury to presume a deed from the original vendor. (4 Barbour, 566.) In Georgia, where there was a bond for a deed on payment of the purchase money, the possession of the purchaser was held to be adverse. Fain vs. Gartwright, 5 Geo., 6. That suit was in behalf of a third party, a stranger to the contract. An entry by one on the

land of another is an ouster of the legal possession arising from the title, or not, according to the intention with which it is done; if made under claim or color of right adverse to the legal title, it is an ouster; the intention guides the entry and fixes its character. The doctrine of adverse possession is to be taken strictly and not to be made out by inference, but by clear and positive proof. Every presumption is in favor of possession in subordination to the title of the true owner. An entry adverse to the lawful owner is not to be presumed, but must be proved. Tyler on Eject., 875, citing 1 Johns. 156; 9 ib., 163; 3 Johns. Cases, 124; 2 Bibb's R., 507; 1 Marsh., 62.

One of the cardinal rules which apply to acts of limitation generally, and which has been recognized in the courts of England and in all others where the rules established in those courts have been adopted, is, that possession, to give title, must be adversary, and it cannot be adversary unless it is hostile to the true title. To allow a different construction, (says Ch. J. Marshall,) would be to make the statute of limitations a statute for the encouragement of fraud—a statute to enable one man to steal the title by professing to hold under it. No laws admit of such construction. Kirk vs. Smith, 9 Wheat., 241; Jackson vs. Birner, 48 Ill., 203. In all cases where a party is in possession of lands in privity with the rightful owners, nothing short of an open and explicit disavowal and disclaimer of holding under that title, and assertion of title in himself, brought home to the owner, will satisfy the law. Short of this, the party will be regarded as holding in subserviency to the rightful title. Floyd vs. Mintsey, 7 Rich., 181. In Williams vs. Cash, 27 Ga., 507, the court say: "If the defendant entered under a contract of any sort for a title, the statute of limitations could not begin to run in his favor until he repudiated the contract and claim to hold in defiance of the plaintiff's title and the plaintiff's knowledge of such adverse holding." The statute, therefore, does not begin to operate until the posses-

sion, before consistent with the title of the real owner, become tortious and wrongful by the disloyal acts of the tenant, which must be open, continued, and notorious, so as to preclude all doubt as to the character of the holding or the want of knowledge on the part of the owner. If he then neglect to enforce his right by action within the period fixed by statute, the loss, as in every other case of the kind, is attributed to his own laches, and not to the law. Tyler, 877. Where one makes a contract to have a deed, though he enter into possession of the land described by it, he is not in a situation to hold adversely, until the condition upon which he contracts to have his deed is fulfilled, for the simple reason that such a possession is not hostile in its inception. He enters, necessarily subject to the right of the owner to turn him off, if he neglects to make full payment. The possession, therefore, when taken, had not the characteristics to constitute it adverse. It was not hostile. Jackson vs. Camp, 1 Cow., 605; Woods vs. Dille, 11 Ohio, 455.

A possession and claim of land, under an executory contract of purchase, is in no sense adverse as to the one with whom the contract is made. But it seems that when one enters under a contract for a deed with one party, and afterwards takes a deed from another party, his possession from this time is adverse to the first vendor, and if continued, the statutory period will bar his entry. Jackson vs. Johnson, 5 Cow., 74.

An agreement for a conveyance, the consideration being paid, has been held to be tantamount to a deed as a foundation for an adverse possession, (La Frombois vs. Jackson, 8 Cow., 589,) and one entering under an executory contract of purchase may always hold adversely, as against all persons but his vendor. Whitney vs. Wright, 15 Wend., 171; Adams vs. Guerard, 29 Ga., 651; 8 Cow., 589; 15 Wend., 381; 9 Cow., 550; 5 Cow., 74; 14 Wend., 228; 1 Cow., 605.

In the light of authority we must hold that the 11th in-

struction prayed by the plaintiffs should have been given, and that the court in refusing so to charge committed an error. Whether the evidence in the case was of such a character that the proposition was applicable or material, we will not determine, as the judgment must be reversed upon other grounds. We treat the question as an abstract proposition, and it receives attention because it is included in the assignment of errors, and was deemed by counsel for appellants as one of importance in the case.

The thirteenth instruction prayed by the plaintiffs is as follows: "If you find from the evidence that the deed under which the defendants claim color of title bears date prior to the 8th day of January, 1848, the defendants must prove adverse possession of twenty years, in order to constitute a bar under the statute of limitations." This was refused as prayed, and the court instructed the jury that "the statutory bar is seven years."

The plaintiffs insist that the statute of January 8, 1848, is not applicable, because the adverse possession commenced, if at all, before the passage of that act, and that, therefore, the adverse possession of twenty years is necessary to be shown by the defendants in order to defeat a recovery against them.

The statute of 1848, limiting the time for the commencement of a suit for the recovery of the possession of lands to seven years from the time the cause of action accrued, provides that the act shall not operate retrospectively, but that it shall commence running from the date of its approval; that the former statute should control until the expiration of seven years from the approval of the act, and not afterwards.

The authorities seem fully to establish the rule that where mere inchoate rights are concerned, depending for their original existence on the law itself, they are subject to be abridged or modified by law, and that statutes of this character apply to such rights existing at the time of their

passage, provided a reasonable time is given after the passage of the act, and before it would operate as a bar, for the party to exercise the right. This is sustained in DeCordova vs. the city of Galveston, 4 Tex., 470; Winston vs. McCormick, 1 Carter, (Ind.,) 56; Gilman vs. Cutts, 3 Foster, (N. H.,) 376; Willard vs. Harvey, 4 ib., 344; Smith vs. Morrison, 22 Pick., 430; Butler vs. Palmer, 1 Hill, 324; Smith vs. Packard, 12 Wis., 371. In the present case, the law as understood by us is this: If the defendants' adverse possession, and that of their grantor or ancestor, of twenty years was complete before the expiration of seven years from the passage of the law of 1848, the action was thereby barred; if it did not expire before the expiration of the seven years from the passage of that act, then their possession, if adverse to the plaintiffs and their ancestors, for the period of seven years since that act was passed and prior to the 13th December, 1861, when the acts of limitation were suspended, entitles them to plead the statutory limitation of seven years.

As to the fourteenth instruction prayed by plaintiffs, we do not see that the jury could have been misled, or that the plaintiffs' case could have been prejudiced by the modification made by the judge, and it cannot therefore be deemed error that the modification was made.

As to many of the questions which we have found it necessary to examine, (because they are suggested by the assignment of errors,) it will be noticed that they are not presented at length in this opinion. To have done so would have unnecessarily enlarged its bulk without corresponding advantage, because the questions alluded to involve settled principles of law, and the present rulings upon them are made only for the purpose of disposing of all the points raised in this case.

A further question is suggested by the record and by the assignment of errors, relating to the additional allowance of costs. The Judge, after the trial of the issues and the ren-

dition of the verdict, made an order to the effect that an additional allowance should be made to the defendants, who recovered judgment, and for the purpose of estimating such amount, took proof as to the value of the property in controversy, and as to that question only, and allowed the sum of eight hundred dollars.

The respondent declined to argue the question before this court.

Section 247 of the Code is as follows: "There may be allowed to the prevailing party, upon the judgment, certain sums by way of *indemnity for his expenses in the action,* which allowances are in this act termed costs." By Sections 248 and 249, costs are allowed of course to the prevailing party in an action for the recovery of real property. By the last paragraph of Section 254, it is provided that in difficult and extraordinary cases, where a defence has been interposed, or where a trial has been had, the court may, in its discretion, make a further allowance to any party, *not exceeding* five per cent. upon the amount of the recovery or claim, or subject matter involved.

It is noticed that the amount of such allowance, not exceeding a certain limit, or the making of any allowance at all, in the class of cases referred to, is in the discretion of the court. The question then arises, When, and in what circumstances, is this discretion to be exercised? Whatever order may be made by the court in the exercise of a pure discretion is, of course, not subject to be reviewed, and in answering this interrogatory we determine how far this court may review upon appeal an order making an additional allowance of costs.

By Section 253 of the Code, a class of cases, and the amount of allowances which may be made in these cases, is too well defined to require comment. Those cases are: 1. Actions for the partition of real property; 2. For the foreclosure of mortgages; 3. Actions in which a warrant of attachment has been issued; 4. An adjudication upon a will

or other instrument in writing; 5. In proceedings to compel the determination of claims to real property. In these cases the amount to be allowed is limited by a certain percentage. The case before us is not one of those cases, it being an action to recover possession of real property, and no "additional allowance" can be made in this case unless it be a "difficult and extraordinary case."

An action to recover possession of real property is not necessarily a difficult and extraordinary case, whether the amount or value of the property involved be great or small. More intricate questions may arise and greater labor and expense may be necessarily required to be bestowed in an action to recover a square foot of land, than in an action to recover real property of greater dimensions and worth a larger sum of money. Whether the case be "difficult and extraordinary," then, is not determined by the form of action or the amount involved. This is rendered more clear, if necessary, by the provision that the allowance may be made only in the event that a defence has been interposed or a trial has been had. Hogeboom, J., in The People vs. The N. Y. C. R. R. Co., 29 N. Y., 429, well says: "The case is difficult and extraordinary within the meaning of the Code. The character and magnitude of the claim, the importance of the interests involved, the length of time it has occupied, and the severity with which it has been contested, bring it fairly within the purview of the section. The case was, therefore, one in which the judge had jurisdiction to act."

In The People vs. Clark, 11 Barb., 343, the court says upon this point: "It was a case not within the range of common professional experience and research. It justified, if it did not require, on the part of the defendant, a consultation with the wisest and most experienced counsel. It therefore involved the necessity for large disbursements for legal assistance."

It will be noticed that one of the grounds to be established

preliminary to the exercise of the discretion of the judge in making the allowance, was the *necessity* for making large expenditures for the protection of the rights of the party. This is undoubtedly a case which is contemplated by the terms difficult and extraordinary, especially in view of section 247, which serves as a preamble to the whole question of costs, and declares that the allowances are made "by way of *indemnity* for his expenses in the action." To impose upon the failing party the payment of a sum of money greater than is necessary to indemnify the prevailing party, would be a punitive judgment, clearly not within the purpose of the law. Costs are recoverable solely upon the principle of indemnity.

The conclusion is, therefore, that the court must be satisfied, before an extra allowance can be made, that the case is a "difficult and extraordinary" one; a case beset with more than the ordinary difficulties of litigation, and necessarily justifying or requiring more than ordinary expenditures of money and labor; and this is a question of fact which must be determined upon such evidence as may be sufficient to satisfy the court, and this determination should appear of record. This is not a matter of discretion, but of judicial judgment. This being determined, the court may exercise its discretion as to making the further allowance which may be an amount not exceeding five per cent, upon the value of the recovery or of the subject matter involved but also not exceeding an amount *necessary to indemnify* the party for his expenses in the action, which amount may be ascertained summarily upon evidence satisfactory to the court. "There is no doubt, (says Johnson, J., in The People vs. N. Y. C. R. R. Co., 29 N. Y.) that it is strictly a matter of law when the judge making the allowance undertakes to give the prevailing party any sum beyond what is necessary to indemnify such party for his expenses in the action, upon the facts appearing on the application."

Is an order making a "further allowance" subject to re-

view upon appeal? In making such allowance there is necessarily an order of the court to that effect, and this order is an "intermediate order"—one made after the trial and before judgment, the costs recovered entering into and forming a part of the final judgment.

An appeal may be taken (Code, sec. 10, sub. 1,) from a judgment of the Circuit Court in an action, and upon the appeal the court may "review any intermediate order involving the merits and necessarily affecting the rights of the parties."

This intermediate order making a further allowance may not involve the merits of the subject matter of the action, the title or right of possession of the real estate in controversy, although the making of the order involves an examination and consideration of the character of the action and of the proceedings had therein. It does, however, involve the merits of the application for the allowance upon which the judgment is rendered, and from which judgment the appeal is taken. The judgment is, first, upon the verdict, and, second, upon certain facts it awards a sum of money to reimburse the prevailing party. It involves the jurisdiction of the court to make the order, the power to be exercised only, as we have seen, in certain cases and upon a certain state of facts.

The order also necessarily "affects the rights of the parties," not to the possession of the property in controversy, but the right of the prevailing party to recover a sum of money from the other. Ch. J. Denio, in delivering the opinion of the court in the case of the N. Y. C. R. R. Co. before referred to, remarks that "an order which peremptorily and finally charges a party with the payment of a sum of money, great or small, which he ought not to pay, or with a greater amount than he ought to pay, affects his rights, not in a matter of form, but in substance; and such was the nature of the order in this case."

Any other interpretation of the clause referred to would place an unauthorized order or judgment, however illegal or oppressive, beyond the reach of review or supervision by the appellate courts. Section 10 commences thus: "The Supreme Court shall have jurisdiction to review upon appeal every actual determination made by the Circuit Court, in all cases," &c. The writ of error is prohibited by the Code, and an appeal substituted therefor.

If the first sub-division of the section does not allow this court to review the "merits" of a proceeding which forms the basis of a part of the judgment, it amounts to a denial of justice and may place the grossest errors, the most flagrant violation of private rights, and abuse of public justice, beyond the reach of a corrective. We are satisfied that this was not the design of the law, and we must interpret it with reference to its evident intent in the furtherance of justice. So far as relates to the power of the Circuit Court to make the order for an additional allowance, to the law and the facts necessary to give such power, to the limitation as to the amount of such allowance, the order is a proper subject of review upon appeal. So far as relates to the exercise of discretion, as to whether the court will allow or refuse such additional costs in a proper case and the amount proper to be allowed, within the prescribed limits, it will not be disturbed.

In the case before us, the grounds upon which the order for additional allowance was made do not appear, neither does it appear that the amount of such allowance was within the amount necessary to indemnify the defendant for his expenses in the suit. These matters ought to appear in the record in order to support the judgment.

For the reasons stated, the judgment of the Circuit Court is reversed and a new trial awarded, and this cause will be remanded with leave to the parties to amend their pleadings, as they may be advised, and for such other and further proceedings as may be had according to law.

WM. G. ZINN, ALDRICH AND OTHERS, APPELLANTS, VS. LOUIS DZIALYNSKI, RESPONDENT, AND SANDERSON & L'ENGLE, VS. LOUIS DZIALYNSKI.

1. Z. A. & C., in 1870, commenced suit by writ of attachment, and levied on the goods of D., defendant, and afterwards obtained judgment and issued execution. After the levy of the attachment, S. &. L. sued D. by summons and obtained judgment and issued execution thereon before judgment was obtained in the attachment suit. The attached property had been sold under an order of court, and the proceeds remained in the hands of the sheriff. The plaintiffs in each suit ruled the sheriff to show cause why the proceeds should not be paid over to them, and the court made one or derunder the title of both suits, denying the application of the attaching creditor, and directing the sheriff to pay over the money to the plaintiffs, S. &. L., after paying twenty dollars to the attorney of the sheriff for preparing his answer to the rules. Z. A. & Co., the attaching creditors, appealed, and the cause appeared upon the docket entitled as of both suits, when S. & L. moved to strike their names and their cause from the docket for the reason that they had not appealed, nor had the defendant appealed, and neither were willing that their suit should be on the docket. *Held*: That Z. A. & Co. had a right to appeal; that the use of the names of all the parties was proper under the form of the order, and that the position of S. & L., as well as that of the defendant, was that of respondents in the appeal.

2. In the above stated case the respondents insisted that the appellants, Z. A. & Co., were not entitled to the rule against the sheriff, because their judgment had been irregularly entered, and was taken without notice to the defendant therein or his attorneys. *Held*: That as the judgment purported to have been rendered by the court which had jurisdiction of the parties, and had not been set aside or reversed, the regularity of the plaintiffs' proceedings, or of the action of the court in giving judgment, could not be inquired into in this proceeding.

3. In a suit commenced by attachment, under the law of 1833, the levy of the attachment upon personal property gave to the plaintiff a specific lien upon the attached property to the amount of his demand, subject to pre-existing liens, and this lien was not divested or impaired by the subsequent recovery of a judgment by another party against the same defendant before judgment was obtained in the attachment suit; in such case the proceeds of the property attached should be first applied to satisfy the judgment in the attachment suit. The term "pre-exist-

ing liens," mentioned in the statute, refers to liens existing prior to the levy of the attachment, and not to any judgment which might be recovered before judgment had in the attachment suit.

4. An allowance to a sheriff of a sum of money for attorneys' fees for preparing a return to a rule to show cause why money in his hands should not be paid over, is not authorized by law. The "Act to Decrease the Expenditures of the State and to Regulate the Fees of Officers," approved June 6, 1870, expressly forbids the allowance of any charges, except such as are authorized by that act.

Appeal from the Circuit Court for Duval County, Fou Judicial Circuit.

This is an appeal from an order made by the Circuit Co for Duval county, upon a summary application after juc ment, which order directed the sheriff to pay over certa moneys in his hands upon which the appellants claim have a lien. The order was in the following form:

"Zinn, Aldrich & Co.,
vs.
Louis Dzialynski.
"Sanderson & L'Engle,
vs.
Louis Dzialynski.

"The said causes coming on to be heard upon the of the respective plaintiffs for an order upon the s show cause why the money in his hands arising sale of the merchandise attached at the suit of the the first of the above entitled actions, and also

Ledwith, the sheriff aforesaid, t

mons against the said Louis Dzialynski on a promissory note made by the said Dzialynski on the 1st day of December, A. D. 1870, to the said Sanderson & L'Engle or ——, that in the said last mentioned ——, execution was issued and placed in the hands of the said sheriff on the third day of May, A. D. 1871, and it further appearing from the answer of said sheriff that he has in his hands, arising from the sale of the said merchandize, attached as aforesaid, the sum of $421.05; that said each of said plaintiffs' claim from the said sheriff all of the said money to the exclusion of the other sharing therein, and that said sheriff desired the order of the court directing him to which of the said plaintiffs he ought to pay over the said money, and after argument of counsel on said motions and the answer, it is considered and ordered and adjudged, that the said execution issued in the said action commenced by Messrs. Sanderson and L'Engle, be ratified in full if there be moneys sufficient, after paying twenty dollars to the attorney of said sheriff for making said answer, and the balance, if any, paid over to Messrs. Zinn, Aldrich & Co., aforesaid.

"August 1, 1871."

This order was made under a rule upon the sheriff to show cause, &c., in each of the above entitled suits, and but one order was made, referring to both suits, as given above.

Zinn, Aldrich & Co., by their counsel, then and there excepted to this order and appealed, serving their notice of appeal upon Mr. L'Engle, surviving partner of Sanderson & L'Engle, attorneys for Dzialynski, defendant in appellant's suit, and as surviving plaintiff in the suit of Sanderson & L'Engle against Dzialynski. The judgment rolls in both the above mentioned suits are copied into the return upon this appeal. The further facts necessary to be stated are contained in the opinion. The appellants assign as errors, that the court erred in making an order directing the said moneys to be paid to them, and in directing the sheriff's

attorney to be paid out of said moneys for services in making the answer.

Bisbee and *Archibald* for Appellants.

1. The lien created by the levy of the writ of attachment takes precedence of a junior execution. Drake on Attachment, Sec. 229, citing 1 McCord, 480; 10 John. N. Y., 129; 2 Pen., 739; 1 Ala., 678; 7 Louisiana Annual, 1; 1 Grant, 172; 4 Smedes & Marshall, 579; 6 Hill, (N. Y.,) 362; 6 Ill. (1 Gibson,) 187; 12 Ala., 838; also Sec. 224 of Drake and cases cited in Notes 2 and 3.

2. Unless otherwise directed by statute, attachments take precedence, and are entitled to satisfaction in the order in point of time of their service. Drake, Sec. 231, Note 1.

3. There is nothing in the record to show that the fi. fa. in favor of Sanderson & L'Engle was ever levied upon the money, and without a levy Messrs. Sanderson & L'Engle had no right to ask for the money; they had no such lien as gave them any title to the money.

The delivery of a fi. fa. to the Sheriff creates only such a lien on personal property as to prevent the debtor from subsequently disposing of the property. 3 Fla., 176; 4 Fla., 126.

A subsequent fi. fa, if first levied is valid, and a sale thereunder of personal property passes the title. 4 Fla., 126.

But where money is in the hands of a sheriff arising from the sale of property attached before judgment, no formal levy of a fi. fa. is necessary. The delivery of a fi. fa. in such a case to the officer, is tantamount to a levy. 4 Met. 137.

4. The fi. fa. in favor of Sanderson & L'Engle could give them no greater right in the property than the defendant had when said fi. fa. was issued. This right was to sell and assign the money subject to the attachment lien. If said lien was discharged by dissolution of the attachment,or plaintiffs failure to recover judgment, then defendant had a right to the money, otherwise he had no right to it, and it became absolutely the property of the attaching creditor when his

judgment was recovered, which absolute right relates back to the date of the attachment. Drake on Attachment, Sec. 221.

5. An attachment levied takes precedence of an unlevied senior execution. Drake, Sec. 230, note 3, citing 11 B. Munroe, 23.

The plaintiffs representing the junior lien on this appeal contend, and have been sustained by the court below in the position, that because they recovered the judgment first, they can come in and take away all the fruits of the diligence of the plaintiffs in attachment.

It must be noticed that the demand sued on by Sanderson & L'Engle did not exist till over six months after the plaintiffs in attachment had acquired a lien, and that said Sanderson & L'Engle, being the attorneys for defendant in the attachment suit, had notice of said attachment lien when they received from defendant the note sued on.

If this position is correct, then a lien by attachment is not of any effect and leaves it in the power of the debtor by collusion with others to entirely defeat the attachment lien.

The position contended for would operate as a gross fraud upon the rights of the plaintiffs in attachment.

Under the statute of February 17, 1833, Thompson's Digest, 368, the service of an attachment binds the property attached, except as against pre-existing liens, without any further qualification or restriction other than that the judgment recovered in the attachment suit shall be satisfied in the same manner as other judgments obtained at the same term of the court, or generally out of the goods, effects and estate of defendant.

The two judgments in question were not obtained at the same term of the court; hence the law of 1833 does not apply, and leaves the attachment to operate uncontrolled by any statute law, and so operating, the attaching creditor has the preference and is entitled to the money.

If the fi. fa. in favor of Sanderson & L'Engle cannot

share by virtue of the statute law of the State, it cannot share at all, because the lien of the attachment is of equal force with that of a levy of an execution, and the one first levied must be first satisfied.

We think it may be very forcibly urged that the construction given to the statute of 1833 by the Supreme Court in Post vs. Carpenter, 3 Fla., 1, is not sound, and that the only effect said statute has is to enforce in attachment suits the common law doctrine that every judgment at the same term of the court has relation to the first day of the term, and from that day is a lien on the real estate of the defendant; and that so far as the real property is concerned, the statute places judgments obtained at the same term of the court upon an equal footing, but leaves the lien upon personal property as before, to be obtained only by a levy of an attachment or fi. fa.

This view of the law is strengthened by the next section of said law of 1833, providing how personal property levied on shall be disposed of.

The attempt by Sanderson & L'Engle to share in this fund, or to get a preference thereto, is fraudulent in its effects upon the rights of the plaintiffs in attachment. Drake, sec. 275, and cases cited in that section.

In Smith vs. Gettinger, 3 Ga., 140, it is decided that a judgment which operates as a fraud upon the rights of other creditors will be set aside.

Again, under the Code, p. 56. sec. 186, all the proceeds of perishable property levied on by attachment are paid over by the sheriff to the attaching creditor.

We think the settled doctrine of equity should be applied to this case: *"Qui prior est tempore potior est jure."*

If the equities be unequal, the preference will be given to the superior equity. Story's Eq. Juris., sec. 64.

John A. Henderson for Sanderson & L'Engle.

To the first error assigned: The Court did not err in refusing order to pay over to Zinn, Aldrich & Co.

1st. Because the judgment and execution of Sanderson & L'Engle were prior to those of Z., A. & Co.; and the execution of Z., A. & Co. was not entitled to proceeds of sale of goods of defendant sold as perishable property, even though such goods might have been originally attached by Z., A. & Co. 3 Fla., 7.

2d. Because the judgment of Zinn, Aldrich & Co. was irregular and therefore void as to other creditors.

If the motion which defendant made to dissolve the attachment, and which was pending, was an appearance, the defendant was entitled to notice of the assessment of damages, which was not given. If it was not an appearance, any subsequent proceedings were irregular while the motion to dissolve remained undisposed of. Code, sec. 194; Thomp. Dig., 370; 4 Fla., 457.

It was an appearance, or the judgment which was taken would have recited for default of "appearance," as well as for default of "answer," &c.

In any event there was either appearance and defendant should have had notice, (Code, sec. 194,) or there was a motion to dissolve pending without appearance; hence the judgment was irregular. (See authorities above cited.)

To the second error assigned: There is no priority of attaching creditors as to whose attachments had been first levied. The lien upon such *personal* goods attaches from the day the execution went into the hands of the sheriff. Thomp. Dig., 368-70; 3 Fla., 1.

RANDALL, C. J., delivered the opinion of the court.

This cause was submitted on briefs by the respective counsel. At the time of submitting the cause, Mr. L'Engle, for Sanderson & L'Engle, and as counsel for Dzialynski, en-

tered a motion to strike the cause of Sanderson & L'Engle vs. Dzialynski from the docket, because it purports to be an appeal taken by said firm of Sanderson & L'Engle, whereas in fact neither they nor the survivor took or desired an appeal, and that no appeal has been taken in the cause of Sanderson & L'Engle vs. Dzialynski; and for the further reason that neither party to said cause is willing that said cause should remain on the docket.

The cause upon the docket is entered therein under the double title of the two causes referred to, as the same appears upon the order from which the appeal was taken. The appeal, however, was taken only by Zinn, Aldrich & Co., and their right to appeal from the order, as it affects their interests, has not been questioned.

The objection raised by the motion to strike from the docket, is to the use of the names of Sanderson & L'Engle in the title of the proceeding. As the appellants, Zinn, Aldrich & Co., were affected by the order, they had a right to appeal, and the use of the names of the other parties was proper. This peculiarity in the form of the order creates no embarrassment, and indeed the use of the names of the parties in both suits for the purposes of this appeal is made necessary by the peculiar form adopted in framing the order.

The order is an adjudication in favor of Sanderson & L'Engle and against the appellants. It appropriates a fund to Sanderson & L'Engle, which, it is claimed by the appellants, belongs to the latter. The fund is the money realized by the sale of the property of the party who was the defendant in both suits in the Circuit Court, which fund must be applied upon the execution of one or both of the plaintiffs.

We think that L'Engle, survivor, &c., is an indispensable party to the appeal, as he was a party to the order, and his relative position is that of a respondent. The appeal was properly perfected by serving the notice upon him as a party and as the attorney of Dzialynski. Neither Mr. L'Engle,

as survivor, nor Sanderson & L'Engle, purport to be appellants.

The appellants are entitled to be heard, and have taken the only course left to them by the law to obtain their alleged legal rights. The motion to strike the cause from the docket, therefore, cannot be granted.

The appellants seized goods of Dzialynski by means of a writ of attachment levied in May, 1870. The defendant made an issue by a traverse of the affidavit upon which the writ issued, and upon trial of this issue the writ and the suit were dismissed. Whereupon the plaintiffs appealed from the judgment of dismissal, and the judgment being reversed, the suit was restored to the docket of the Circuit Court and stood as though no trial had been had. No subsequent trial of the traverse was had, but a final judgment upon the merits in favor of the plaintiffs for $1,788.65 and costs was rendered by the Circuit Court, as we understand the record. It is insisted that the judgment was taken without notice to the defendant or his attorneys, and therefore was irregularly entered. This may have been the case, but still it is a judgment of a court of record, and the regularity of the proceedings cannot be called in question in this matter, the court having had jurisdiction of the parties and of the subject matter. If there were cause for setting aside the judgment or reversal on account of irregularities, the parties had their remedy by motion to the proper court. While it stands unreversed, a mere irregularity in a matter of practice cannot be inquired into collaterally as in this proceeding.

The more important question, however, is, whether the appellants are entitled to the proceeds of the property attached by them. Sanderson & L'Engle commenced their suit by summons against the same defendant in December, 1870, and obtained their judgment in January, 1871, several months before the appellants obtained their judgment, which latter was taken in June, 1871.

The appellants claim that they had an exclusive lien upon the proceeds of the property attached, and that such proceeds should be applied to the payment of their judgment and execution; while L'Engle, survivor, &c., insists that his judgment and execution must be first satisfied, as the latter judgment, having been first entered, created a lien prior in right to that of the appellants, and so held the Circuit Court.

Section 9 of the act of February 17, 1833, (found in Thompson's Digest, 368,) reads as follows: "The service of a writ of attachment shall not operate to dispossess the tenant of any lands or tenements, but such service shall bind the property attached, except against pre-existing liens; but the judgment in a suit commenced by attachment shall be satisfied in the same manner as other judgments obtained at the same term of the court are, or shall be satisfied out of the lands and tenements, goods and chattels generally of the defendant in attachment; provided, however, that judgment rendered against any garnishee or garnishees in said suit shall be appropriatel exclusively to the satisfaction of the judgment rendered against the defendant, commenced by attachment as aforesaid."

Counsel for the respondent insists "that the attached property was not to be appropriated, under this statute, to the payment of the judgment obtained by the attaching creditor, unless such judgment be older than others, but that all judgments were to be satisfied, according to priority, the only effect of the attachment being to hold the property for the payment of debts according to priorities to be afterwards established;" and reference is made to the case of Post & Carpenter, 3 Fla., as establishing the construction thus contended for.

In that case the conflicting claimants were all attaching creditors, and their judgments were all obtained at the same term. We do not see that the court gives such a construction to the act as that the terms "pre-existing liens" re-

ferred to the date of the judgments to be thereafter recovered and gave to such judgments a priority of lien over that of an attaching creditor whose writ was levied before any judgment was obtained. The terms "pre-existing liens" must refer to liens existing prior to the levy of the attachment.

In the cases mentioned in the section quoted, the writ of attachment, duly levied, created a lien upon the property seized, and this lien must be enforced in favor of the attaching creditor, to the exclusion of all subsequent liens, except, perhaps, as to such judgments as might be "obtained at the same term of the court." It does not in express terms or by implication yield any right to a judgment creditor whose judgment may be obtained at any other term or time. The court remarks in Post & Carpenter that "this law of attachment being in derogation of the common law, we are not disposed to extend its provisions beyond the manifest meaning of its terms; and we should be loth so to extend them as to give a preference to attaching creditors over those who pursue the ordinary process of law, unless the statute contained clear and unequivocal words to that effect."

The 12th section of the act of 1833, found on the same page, 368, of Thompson's Digest, is as follows: "All *personal* property levied on by attachment, unless replevied, shall remain in custody of the officer who shall attach the same until the judgment of the court shall be pronounced, but when the property attached shall be of a perishable nature, it shall be lawful * * to grant an order for the sale of such property, * * and the proceeds of such sale shall be paid into court and abide the judgment thereof." It seems clear that the latter section in providing that personal property attached, or its proceeds if sold, shall remain in the custody of the officers of the court until the judgment of the court shall be pronounced, and abide such judgment, secures and continues to the attaching creditor a spe-

cific lien upon it; and as a previous section provides that the writ shall require the officer to attach only *so much* of the defendant's property as will be sufficient to satisfy the sum demanded by the plaintiff in that writ, it would seem that it was intended to provide a security for the claim of that plaintiff only, and without some clear expression of the law to the effect that the proceeds of personal property attached shall be distributed among other creditors who have not attached it, thus taking away the security obtained by the more viligant creditor, we are not inclined to give a construction that will produce such a result. That such may be the case where real property is attached, is not the question here. The court in Post & Carpenter has given to several attaching creditors, where personal property has been attached, a *pro rata* share of the proceeds without reference to the priority of the levy of the several attachments, where judgments were obtained at the same term. (What would have been the result if the creditor who obtained the first levy of an attachment had been unable to obtain his judgment until a term subsequent to that in which other creditors obtained judgments, the court in that case has not determined.)

It may be that a literal observance of the terms of the statute would be attended with some embarrassment, and might work injustice in some instances; but as the present case is not attended with such circumstances as to present any of the difficulties suggested, we are not required to go in search of them, nor do we conceive that the judgment of the court in the case referred to is inconsistent with our conclusions in the case before us. The judgment of Messrs. Sanderson & L'Engle does not appear to have been obtained at the same term as that of the appellants, neither was their suit commenced by writ of attachment.

But if there were any doubts upon the matter in question under the former statute, we think the provisions of the Code have removed them. Section 86 of the Code provides

that in case judgment be entered in such action, the sheriff shall satisfy the same out of the property attached by him, if sufficient for that purpose, by paying over to the plaintiff the proceeds of all sales of perishable property, and of any vessel or shares or interest in any vessel sold by him, or of any debts collected by him; and by selling under execution any other property attached to satisfy any balance due, &c., and generally to apply all the proceeds of attached property to the payment of the judgment. The provisions of the Code apply to actions pending at the time of its taking effect, (July 1, 1870,) and the appellants' suit was then pending. The cause of action of Messrs. Sanderson & L'Engle, upon which their judgment was obtained, had not then accrued. By the terms of the statute, as we have seen, the levy of the appellants' writ created a lien upon the attached property, and no circumstances are presented which, under the statute, have deprived them of such lien. No other creditor had an interest in the lien. The attaching creditors could, at any time, have released their levy, and the property would have been returned to the defendant unincumbered, unless a subsequent levy had been made.

From the view we have taken, it results that the order appealed from must be set aside.

Exception was taken to the latter part of the order which allows to the attorney of the sheriff twenty dollars for preparing the answer of the sheriff to the rule requiring him to report the amount of the proceeds in his hands, and to show cause why it should not be paid over, &c.

This is a duty required of the sheriff, for which no specific fee is provided, and we think the court is not authorized by law to prescribe one. That is the province of the Legislature. An act entitled an act to decrease the expenditures of the State and to regulate the fees of officers, approved June 6, 1870, provides that the officers named, including sheriffs, shall not make any charge whatever, ex-

cept that in this section prescribed; and as no such allowance or charge is prescribed, it is forbidden.

Order reversed.

JOHN O. MALLEY, APPELLANT, VS. INGERSOLL & WATLINGTON, RESPONDENTS.

For the purpose of review upon appeal from a judgment, the record must contain exceptions signed by the judge who presided at the trial, and the appellate court will dismiss an appeal unless the exceptions were duly signed. A case merely stated and signed by counsel will not be examined. This has been repeatedly held by this court before and since the adoption of the Code. The law does not authorize this court to reverse a judgment upon the mere statement of counsel.

Appeal from the Circuit Court for Alachua county, Fifth Judicial Circuit.

S. Y. Finley for Appellant.

E. M. Thompson for Respondent.

RANDALL, C. J., delivered the opinion of the court.

This cause is submitted on briefs, on the part of the appellant, upon the record which he has brought up. The record or "judgment roll" shows that an issue was joined by the parties, a trial had before a jury, a verdict rendered, and a motion made upon the minutes for a new trial, which was denied by the court. The order denying the motion for a new trial is signed by the Judge, and this is followed by this entry: "Excepted to by plaintiff's attorney," not signed. In a later portion of the record is a paper purporting to be a "case with exceptions," but it is signed by coun-

sel only, and not by the Judge. In the case of Bogue vs. McDonald, decided at the last term, and in other cases heretofore decided by this court, it has been held that even a stipulation or agreement signed by both parties in the form of a bill of exceptions, and upon which the case was argued to be submitted, without the exceptions being verified by the signature of the Judge, would not be considered in lieu of exceptions so verified. We cannot reverse a judgment merely on a statement of counsel.

The Code provides that when a motion for a new trial is heard and decided upon the minutes of the Judge, and an appeal is taken, a case or exceptions must be settled in the usual form, upon which the argument of the appeal must be had. The rules of the Circuit Court Nos. 32, 33, 34 and 35, prescribe the mode of settling a case, or exceptions in such cases, and they plainly direct that for the purposes of review, the exceptions must be settled and signed by the Judge. We cannot entertain a hypothetical case presented upon the suggestion of counsel on either side, or upon a stipulation of several counsel. This case is presented merely upon an exception signed by counsel for the appellant, and therefore the appeal must be dismissed. But as the respondent has not appeared, and the appeal is dismissed by the court without motion, no costs are allowed to respondent.

RAIN, HARVARD AND OTHERS, APPELLANTS, VS. SAVAGE AND HAILE, RESPONDENTS.

Appeal from the Circuit Court for Alachua county, Fifth Judicial Circuit.

This is a motion to dismiss the appeal. The grounds for

the motion, so far as they are considered by the court, are stated in the opinion.

McDonnell & Finley for Appellants.

J. B. Dawkins for Respondents.

RANDALL, C. J., delivered the opinion of the court.

The appellants, who were plaintiffs in the court below, have appealed to this court as from a judgment against them. On inspection of the return it does not appear that any judgment was entered upon the verdict of the jury who tried the cause, (it being an action to recover money,) and therefore there was nothing to appeal from.

The respondent moves to dismiss the appeal on the ground, among others, that there are no exceptions, or case with exceptions settled and signed by the Judge.

For these reasons the appeal must be dismissed, with ten dollars costs of motion to the respondents.

WYLDE L. L. BOWEN vs. JOHN DARBY.

1 When a record returned on appeal contains in narrative form what purports to be the proceedings of the court on the trial, the instructions of the Judge to the jury, a motion for new trial, the order of the court denying the motion, exceptions thereto and exceptions to the rulings of the court upon receiving or rejecting testimony embodied in the statement of the testimony, and in the usual form of a case and exceptions and is duly signed by the Judge, it will be presumed that the case was regularly settled and the exceptions signed in pursuance of the rules of the court, unless the contrary appears by the return.

2. Where the payee or holder of a note by a valid contract with the principal. debtor agrees to give further time of payment beyond the time mentioned in the note, without the consent of the surety upon the note, such agreement will release the surety. And where the surety signs the note as a joint principal, whether the fact that he is a surety be apparent upon the note or not, he may, under the present law of this State, in an action upon the note, show in his defence the agreement between the principal and the holder, entitling him to a discharge.

3. When a note was made payable in gold coin, and the court permitted evidence to be given by the plaintiff to show the value of gold coin in "greenback" currency at the time the note became due, and instructed the jury that they might find a verdict for such value with interest, and the jury found a verdict accordingly; *Held*: That such ruling and instruction was erroneous. The amount due in gold coin should be the rule of estimating the damages, and the verdict showing such amount due in gold coin should be followed by a judgment for such amount payable in coin.

Appeal from the Circuit Court for Columbia County, Third Judicial Circuit.

The action is upon a promissory note, which reads as follows:

"$3,000. LAKE CITY, FLA., 5th March, 1867.

On the first of November next, we, or either of us, promise to pay W. L. L. Bowen, or his order, three thousand dollars in gold coin, for value received.

(Signed) J. J. DICKINSON,
G. L. DENTON,
CHAS. E. HAILE,
H. V. SNELL,
J. DARBY,
E. L. HARRISON."

The summons notifies the defendant that unless he answers the complaint, &c., the plaintiff "will take judgment for the sum of three thousand dollars in coin, with interest."

The complaint demands judgment for "the sum of three thousand dollars in gold coin, with interest," &c.

The answer of the defendant states that the note was made by J. J. Dickinson as principal and the defendant as

an accommodation security, and that plaintiff, knowing this fact, agreed with said Dickinson, in consideration of an increased rate of interest to be paid by said Dickinson, and which he did pay, gave Dickinson additional time and indulgence on the note; that the sum of three hundred and five dollars was paid by Dickinson to plaintiff as additional interest under said agreement for further time, and that the agreement was made without defendant's knowledge or consent, whereby the defendant insists that he was discharged from his liability. The defendant further answers that said Dickinson has made payments on said note to the amount of two thousand seven hundred and sixty dollars and nine cents, including said amount paid for extra interest.

The cause was tried at the November term, 1871, before a jury.

On the trial, the plaintiff, W. L. L. Bowen, was sworn in his own behalf. The note sued on being introduced in evidence, "the plaintiff offered to prove what gold was worth at the time the note became due," in order to ascertain the damages, claiming that that was the amount he was entitled to recover. The court, upon objection, ruled "that gold was now considered a commodity, and that the plaintiff was entitled to recover in currency the amount the gold was worth at that time, and admitted the evidence," which ruling was excepted to by counsel for defendant.

The witness then testified that gold was worth on the 1st of November, 1867, forty-one cents premium in New York in Savannah and other Southern cities, forty cents.

Some evidence was given upon the question whether an increased rate of interest was agreed, between the plaintiff and Dickinson, to be paid by Dickinson, and afterwards actually paid to plaintiff in consideration of an extension of the time of payment of the note; and some evidence in relation to a settlement between the parties and the giving of drafts in satisfaction of the note. Witness says he never agreed with Dickinson to suspend his right of action again

any of the parties. The witness testified that the negotiation for the loan of the money, which was the consideration of the note, was with Gen. Dickinson. "I told him I would loan money on a note made by five or six as good men as could be found in the State. He afterwards presented me the note now in suit, and I accepted it as satisfactory. I paid him $3,750 in currency for the note, which included the premium on the gold and interest up to Nov. 1, 1867, when the note fell due."

On the part of the defendant, J. J. Dickinson testified that he negotiated with the plaintiff for the loan and had the note executed in pursuance of an agreement. Question by defendant's counsel: "Did you sign said note as principal debtor and procure the other signatures to the same as accommodation sureties in pursuance of said agreement?" The court ruled out the question, and the defendant excepted to the ruling. Receipts, &c., were produced, signed by the plaintiff, which appear to be for money paid on account of the note as follows: Receipt dated Jan'y 1, 1870, $167.79; draft Sept. 24, 1869, $133.00; receipt Jan. 5, 1870, $716.54; receipt Jan. 5, 1870, $124.25; Sept. 24, 1869, $317.22; Jan. 26, 1869, $178.24.

An account of J. J. Dickinson against plaintiff for goods, &c., amounting to $350.08, was put in evidence, "date agreed upon, Nov. 12, 1870." A note of Dickinson to plaintiff for $195 in gold coin was offered in evidence, and Dickinson testifies that he paid this note to plaintiff in gold, as extra interest for indulgence of time on the note in suit, to the best of his recollection. Defendant's counsel asked, "was the present defendant a party to such indulgence, or was it done without his consent?" Question ruled out and defendant excepts. The note of $195 was excluded by the court and defendant excepts to the ruling of the court. Witness further states that the proposition for indulgence of time on the note in suit was made in the same month that the note was due. No other person was present. Of

the receipt for $716.54, dated Jan. 5, 1870, $110 is for extra interest.

The court charged the jury among other things, 1. "That the note is a joint note and all are principals, and that parol evidence cannot be received to show that any of the parties are security, and that no agreement to extend the time of payment will release or exonerate the parties to this note."

2. "Gold is now treated as a commodity, and you will give the plaintiff the amount in currency that gold was worth at the time the note became due, as stated in the testimony."

3. "All that the defendant could ask would be that the amount paid as extra interest should be applied upon the note, then and there agreeing to pay the remainder."

4. "The court charges you that you will give the defendant credit for all the credits proved or offered, except the gold note, which has been ruled out by the court."

A verdict was returned in favor of the plaintiff, assessing the damages at $3,286.61, for which judgment was entered.

The defendant's counsel moved for a new trial upon the following grounds:

1. That the verdict is contrary to evidence.

2. The court erred in charging the jury that parol evidence could not be given to show that any of the parties to the note in suit had signed the same as securities.

3. The court erred in his charge in relation to the rights of equitable defence, &c.

4. In the third clause of his charge.

5. In charging that the value of gold should be estimated in U. S. currency at the time of the note falling due, which motion was denied and the defendant excepted to the decision.

The defendant appealed and assigns as errors the various grounds stated in the motion for a new trial, and the decision of the court in its rulings upon the admission of evidence to which he had excepted.

Finley and *Hagan* for Respondent.

Bowen sued Darby in the Circuit Court for Columbia county, as one of the makers of a joint and several promissory note payable in gold coin; the action being in the usual form, of summons and complaint for money only.

1. The allegation of misrepresentation in the answer is no defence as pleaded, because it does not state that the misrepresentation was made by the plaintiff, and even if it did, there was no attempt made to sustain the allegation by proof. See evidence in the record.

2. Darby was a joint and several maker of the note sued on, and nothing appears on its face to show that he signed it as surety.

In a joint and several note, all the makers are principals, and as against the creditor, evidence is not admissible to show that some are sureties. Byles on Bills, marg. p. 192 and note (i); 2 Kent. Com., 556.

A joint and several maker of a note, where his character as surety does not appear on the face of the instrument, will not, in an action by the holder, be allowed to prove that he is a surety merely. 2 Kent. Com., 556; 2 Phill. Ev., 350; 12 Wend., 573; Byles on Bills, marg. p. 192 and note, (i.)

The general rule is, that parol evidence is not admissible to contradict or vary the terms of a written contract which is intelligible in its terms, nor to impose upon it a sense which its terms do not imply. 2 Kent. Com. 556, (marg.;) 9 Fla., 503; 2 Abbott's Nat. Dig., 339, No. 593, and the cases there cited.

By the terms of the note upon which the action is founded, the defendant is a maker and not a surety, and if parol evidence should be admitted to show that he was in fact a mere surety, would be to impose upon the note, which is a written contract, a sense which its terms do not imply; and would be a clear violation of the rule.

It is therefore contended, that the court below did not err,

in refusing to allow the defendant to prove by parol that he was a mere surety and not a maker of the note.

If I am correct in this, and the defendant is not allowed to show that he is a surety and not a maker, it will be unnecessary to consider the question as to what indulgence will have the effect to discharge a surety or endorser.

But as the question is raised by the counsel for defendant, I submit to the consideration of the court the following propositions and authorities:

1. It is a settled rule of law that extending to principals further time for payment will not discharge the surety. Brightley's Fed. Dig., 824, Sec. 72.

2. Even a local statute authorizing a surety to require the creditor to sue, &c., does not apply to a case in which the principal and surety unite in a joint and several bond. Brightley's Fed. Dig., 825, Sec. 97, and cases there cited.

But a surety whose character appears on the face of the instrument, may call upon the creditor to proceed. Brightley's Fed. Dig., 823, Sec. 35 and cases there cited.

In England it is held that the *bona fide* holder of a bill or note cannot be prejudiced in his right, according to the terms of the instrument, by the knowledge that the acceptor or maker is surety, without a specific agreement to treat the acceptor or maker as surety. 3 Kent Com., 115, note 2; 18 Eng. L. and Eq., 351.

3. The indulgence which will discharge an indorser or surety, must not only be on a good consideration, but it must also be for a limited and definite period. Brightley's Fed. Dig., 824, Sec. 61.

In order to discharge the surety, the agreement of the holder must be to destroy or suspend, or else a contract to destroy or suspend his right of action against the maker. Byles on Bills, 193.

Mere indulgence or delay will not have the effect to discharge a surety. Byles on Bills, 193, and note.

But an agreement on good consideration not to sue the

maker at all, or not to sue within a specified time, will discharge an endorser or security. Byles on Bills, 194.

Now the proof in the record not only shows that the plaintiff made no agreement with Dickinson to destroy or suspend his right of action on the note against any or either of the makers thereof, but on the contrary establishes the fact in the most direct and positive terms, that the plaintiff did not at any time make any agreement with any one, by which he would be prevented from suing any or all of the makers of the said note for even a moment of time.

And hence it is argued that even if it were competent for the defendant to show (which we deny) that he is only a surety on the note, he has signally failed to prove upon the trial that the plaintiff ever gave such indulgence to Dickinson as would have the effect to discharge him. It is thereford contended that even if the court below erred in ruling out evidence to show that defendant was a surety, still this court will not reverse the judgment if the verdict is sustained by the evidence. 6 Fla., 482; ib. 516.

But it is contended by the counsel for defendant, that the court below erred in instructing the jury that in the event they should find in favor of the plaintiff, they should allow him the difference between gold coin and currency at the time the note became due, and the gold became payable.

The plain and settled rule of law which governs in all such cases is, that the engagement of the maker of a note is that it shall be paid at the time, and if it be not, the holder is entitled to indemnity for the loss arising from this breach of contract. 3 Kent's Com., marg. p. 115.

This general principle is the foundation of all claims for damages for breach of contract. And so if a note (like this) be made payable in gold coin at a given time, and it be not paid at that time, the holder of the note will be entitled to indemnity for the loss arising to him from the breach of contract, and the difference between gold coin and currency at that time will clearly be the correct measure of damages.

J. M. and *H. J. Baker* for Appellant.

It is a well settled principle, that if a creditor, by a valid agreement, without the assent of the surety, gives further time for payment of the debt to the principal, the surety is discharged, and it makes no difference whether the surety is damaged thereby or not. 1 Gilman, 419; 3 Metcalf, 255; 10 Peters, 258; 1 Story Eq. Jur., 319; 10 John., 587; 7 Page, 451; 11 Wend., 312; 6 Wend., 246.

When the creditor, by a valid agreement with the principal, varies the terms of the contract by enlarging the time of performance without the consent of the surety, the surety is discharged. 7 Munroe, 541; 1 M'Cord, 112 and 297; 1 Des., 315; 8 B. Munroe, 382.

When the creditor does any act impairing the rights of a surety, or varies the terms of the contract, or enlarges the time of performance, without consulting surety, the surety may set up and plead the same in discharge, either in law or equity. 13 John., 173-4; 17 ib., 390; 2 John. Ch., 554.

An indulgence to debtor, giving additional time, contrary to the terms of the original agreement, if done without his consent, discharges the surety. 18 Vesey, 20; 7 John., 332.

A note signed A, principal, and B, surety, is held to be a joint and several note. The only effect of writing the surety on note is to give notice to holder. In this case, plaintiff, by his testimony, shows he had notice. Story on Promissory Notes, § 69, note.

In a joint or several note, signed by two, on suit against the security by principal, proof may be received to prove the consideration, as well as the fact, that defendant signed as accommodation surety. 2 Fla., 136; 3 Fla., 135.

In the above cases, the able counsel engaged did not dispute the right to introduce evidence to show that Cotten, the joint maker of note in suit, was accommodation surety.

Parol evidence may be given to contradict a written, simple contract, or to show that the whole of it was not re-

duced to writing, but that there were conditions not contained in the written contract, when the action is between the original parties. 6 Mass., 430.

Parol evidence may be admitted to explain a written instrument. 8 Durnf. and East, 379; 1 East, 831; 2 ib., 240.

For the purpose of letting in evidence of the discharge of a surety, parol evidence that he signed as surety only is admissible. 21 Pick., 195.

Even in a deed or specialty, presumptions of law, in relation to matters of fact, may be repelled by parol testimony. 15 Mass.; 85.

The fact that respondent signed the note in suit, with others, without adding the word "surety," might create a presumption at law that he was a principal. Under the above decision, parol evidence is admissible to repel that presumption.

If the right to make such defence at common law is doubted, that right would clearly exist under the Code, which abolishes all distinctions between actions at law and suits in equity. Code, Title 1, Sec. 49.

Under the head of Equitable Defenses are included all matters which would have authorized an application to the Court of Chancery for relief against legal liability, but which at law could not harm him pleaded in bar. 12 N.Y., 166.

In an action legal and equitable, claims for relief may be united. Defendant has nothing to do with the form of relief demanded. How., 269; 21 How., 296.

The note sued upon was payable in gold, which is money, the constitutional currency of the United States, a legal tender in payment of dues of all kinds, and not a commodity or merchandise. Const., Art. 1, Secs. 8 and 10; 1 U. S. Statutes at Large, 250, Act 1792, Sec. 16.

Plaintiff would have been bound, at date of trial, to receive gold in payment, if it had been tendered. Conse-

quently no proof of its value at any other date was admissible.

Gold coin being the standard of value in the United States, all other authorized currencies have a relative value, which may fluctuate in proportion to the confidence inspired in commercial circles or centres, but the value of gold coin is not disturbed by the fluctuation of other values.

Gold coin is not less valuable now than in 1867, but greenbacks are more valuable on account of the increased confidence in the credit on which they are based.

One hundred and ten dollars in greenbacks represented, on the day of the trial of this cause, as much as one hundred and forty dollars in 1867, when note became due.

The effect of the evidence permitted on trial, and the charge of the court, was to give twenty-seven dollars on each one hundred dollars due the plaintiff more than he was entitled to, under the contract, from any part to said note.

The only damage or penalty for non-payment of money due by note, is the payment of interest, which is fixed by law, or by contract in writing. 6 How., U. S., 154; 2 Fonblanque's Eq., 423.

Fixing rate of exchange, the rule is the rate at date of trial, not when claim becomes due. 8 Sergt. and Rawle, 48.

It appears from the evidence that a gold note for $195, given to plaintiff, and, after taken up by Dickinson, the principal, in $3,000 note, was offered as evidence of payment by defendant, and ruled out because it was shown that Dickinson had given same to plaintiff for further time.

The giving further time to principal without consent, being a fraud upon the defendant, he was entitled to discharge from all liability on said note.

If not discharged, he was entitled to credit for the entire amount paid by Dickinson to plaintiff. To refuse such credit would be to allow the plaintiff to take advantage of his own wrong, in taking from Dickinson the means, and diminishing his ability, to pay his debt.

The presiding Judge in the Circuit Court, having admitted improper testimony on part of plaintiff, having ruled out defendant's testimony, which should have been admitted, and improperly and erroneously charged the jury upon the law, the defendant was entitled to a new trial upon his motion entered upon the record, which motion was improperly refused.

RANDALL, C. J., delivered the opinion of the court.

Before submitting this cause, the counsel for respondent moved to dismiss the appeal upon the ground that a case or exception had not been made or notice thereof given to the respondent, or copy served, as required by the rules.

On examination of the record, it appears to be made up in the usual form of a case and exceptions, containing the proceedings, including exceptions taken upon the trial, the instructions of the Judge to the jury, the verdict and final judgment, the motion for a new trial and the order denying the motion, signed by the Judge, and exceptions thereto also signed by him, all in consecutive order and in the appropriate form of a case and exceptions duly settled and signed. It is true that it does not affirmatively appear that a copy of the case was served before being settled and signed by the Judge, by any express recital of the fact, but it must be presumed when a case and exceptions in proper form, duly signed by the Judge, appear in the record, that it was regularly done. We can presume nothing going to impeach the regularity of the action of the Judge or court.

Any irregularity in the making up of the record or judgment roll must be corrected in the court where it is made, unless the defect be such that the correction may be made upon a suggestion of diminution of the record. We must consider it as we find it, and if it be imperfect the parties may employ an appropriate remedy. We have, therefore, declined to grant the motion to dismiss the appeal. See

Hunt vs. Bloomber, 12 How., Pr. Rep., 567; 3 Kernan, 341.

The first point made by the appellant's counsel is that the court erred in rejecting testimony offered by defendant to prove that the defendant was a surety of Dickinson, and in charging the jury that such testimony was not to be received to prove such fact, and that no agreement to extend the time of payment will release or exonerate any of the parties to this note.

It is the settled law that where a payee or holder of a note or obligation, by a valid agreement, binding as between him and a principal debtor, agrees to give time for payment beyond the time stipulated in the original contract, without the consent of a surety of the principal, such agreement will release the surety. And a court of law as well as equity gives the same effect to the extension of time by the creditor to the principal, and holds the surety discharged. This principle is not controverted by counsel in this case. To enable a surety to avail himself of this defence at law, the instrument must on the face of it show that he is such surety; if he is bound as principal, he cannot *at law* aver by pleading that he he is bound as surety, though *in equity* parol evidence is admissible to show who is principal and who surety. Burge on Suretyship, 211; Rees vs. Berrington, 2 Ves., Jr., 540; 14 Ves., 160.

The case of Sprigg vs. the Bank of Mount Pleasant, in the Supreme Court of the United States, (10 Peters, 257,) was a suit upon a bond executed by several persons, in which they were all expressly named as principals. The action was at law. The court (Thompson, J.,) says: "If the defendant can be let in to set up that he was surety only, the matter alleged is sufficient to exonerate him from liability in the present suit. It falls within the settled rule of law in relation to sureties, that extending to the principal further time of payment by a new agreement, will discharge the surety. It has been contended that it appearing ex-

pressly on the face of the bond that the defendant acknowledged himself as principal, did not vary the question; for that all joint and several obligors in a bond are in judgment of law considered principal. This is true as a *prima facie* presumption of law: but is not conclusive upon a party when drawn in question before a proper tribunal. But as matter of estoppel at law, it may stand on a different footing, and is, at all events, as matter of fact more conclusive. * * That a party has, by his own voluntary act, placed himself in a situation, as to mere matter of fact, that he is precluded from denying it; * * and it is a salutary practical rule that a man shall not be permitted to deny what he has solemnly acknowledged. In ordinary cases, when sureties sign an instrument without any designation of the character in which they become bound, it may be reasonable to conclude that they understood their liability was conditional, and attached only in default of payment by the principal. And hence the reasonableness of the rule of law which requires of the creditor that his conduct, with respect to his debtor, should be such as not to enlarge the liability of the surety and make him responsible beyond what he understood he had bound himself. * * But admitting that, although the defendant has upon face of the obligation become bound as principal, yet a court of equity might allow him to set up that he was surety only, and let him in to all the protections that are usually extended to sureties, the present case is to be governed by rules applicable to proceedings in courts of law."

It thus appears by the very highest authorities in this country and in England, that the defence referred to may be made in an action at law, where the fact that the defendant was a surety is admitted or appears upon the face of the contract; but where the contract discloses the fact that all the makers are principals, the defence can only be made, or the relief had in a court of equity, wherever the distinction be-

tween the proceedings in courts of law and those in courts of equity exists.

But the Code of Procedure of this State has abolished all distinctions in the forms of action between legal and equitable remedies, and section 101 of the Code allows the defendant to set forth by answer as many defences and counterclaims as he may have, whether they be such as have been heretofore denominated legal or equitable, or both. So that it was competent for the defendant to avail himself of the defence that he was a surety in fact, and that he had been discharged by the happening of any circumstances which would have availed him in a court of equity under the former practice. The court therefore erred in excluding the evidence sought to be given by the defendant, and in instructing the jury that such defence would not avail him.

The remaining question in this case is whether the plaintiff is entitled to recover the "currency" value of the gold coin, the value to be ascertained at the time the note became due, with interest. The note in suit became due November 1, 1867, and the proof shows that the difference in the value of gold and "currency" was about forty cents on the dollar. A computation of the amount due, upon this basis, allowing credit for the various payments shown by the receipts, demonstrates that the jury ascertained the amount by the rule, and found their verdict accordingly, being about four per cent. more than the amount actually due in coin.

It has been suggested that gold coin is a merchantable commodity and that the standard of value now in this country is United States currency or "greenbacks," and where $100 in gold coin was in 1867 "worth" $140 in currency, and the difference now being 10 or 12 only, that therefore gold has fallen or depreciated. We think this is a mistake. Gold coin represents value as a standard; "currency" represents credit or confidence. The paper promises of a government or an individual are the representatives of the credit of the government or person. The ability and disposition

to pay fixes the value to be estimated in money. It would be absurd to say that the paper promises issued by a person or a bank formed the basis of the value of gold, and it is equally absurd to apply the doctrine to the paper of the government.

In the present case, had the maker of this note tendered, at the last moment, the amount due on its face in gold coin with interest, it would have been a satisfaction, because it would have been a compliance with the promise just as fully as a tender of currency after the time of payment had arrived would be a compliance with a promise to pay currency.

The judgment to be rendered should be a judgment enforcing the contract. The summons in this case notifies the defendant that the plaintiff, on failure to answer, will take judgment for $3,000 in gold coin with interest. The complaint demands judgment for "$3,000 in gold coin, with interest." Thus the summons and complaint demand a specific fulfilment with the terms of the note, and this is perfectly legitimate. The judgment is for an amount in dollars forty per cent. greater than the amount demanded in dollars by the plaintiff.

The Supreme Court of the United States, in three late cases, has indicated the proper judgment to be given upon such contracts. In Bronson vs. Rhodes, 7 Wallace, 254, the court says: "When contracts made payable in coin are sued upon, judgments may be entered for coined dollars and parts of dollars; and when contracts have been made payable in dollars generally, without specifying in what description of currency payment is to be made, judgment may be entered generally without such specification. We have already adopted this rule as to judgments for duties, by affirming a judgment of the Circuit Court for the District of California in favor of the United States for $1,388.10, payable in gold and silver coin, and judgment for express contracts between

individuals for the payment of coin may be entered in lik manner." This is the judgment of the same court in Wallace, 320; Butler vs. Horwitz, 7 Wallace, 258; Dewr vs. Sears, 11 Wallace, 379. While this is the rule in th courts of the United States in common law actions, there i perhaps less doubt as to the propriety of entering a specifi judgment following the terms of the contract, under ou present Code of Procedure. We are therefore of the opinio that the ruling of the court in admitting testimony to sho the "value of gold" at the time the note became due, an in directing the jury to compute the amount due in "cur rency" upon that basis, was incorrect.

The judgment must, for the reasons herein stated, be re versed, and a new trial granted, with costs against the re spondent.

THOMAS R. SMITH, GUARDIAN, RESPONDENT, VS. T EUGENE GIBSON, APPELLANT.

In prosecuting appeals from judgments rendered in chancery causes, which were pending at the date of the passage of the Code, neither a case nor exceptions is necessary. The court will review the law and the facts upon the record in the same manner as it did under the practice anterior to the Code. The delay in filing the return in this case being attributable to a misapprehension of the parties and failure of the judge to act, the appeal should not be dismissed on account of the delay.

Appeal from the Circuit Court for Columbia County Third Judicial Circuit.

This is a motion to dismiss the appeal. The grounds fo the motion, so far as considered by the court, are stated i the opinion.

E. C. Love for Respondent.

John W. Malone for Appellant.

WESTCOTT, J., delivered the opinion of the court.

The respondent moves to dismiss the appeal upon two grounds:

First—Because the appellant has not caused the proper returns to be made and filed with the clerk of this court within twenty days after the perfecting of the appeal.

The respondent has filed a certificate from the clerk of the court below that an appeal has been taken, and makes an affidavit that notice of the motion to dismiss the appeal has been served upon the appellant's attorney. Under these circumstances, the appeal should be dismissed, unless the appellant shows good cause for his omission in failing to file his return twenty days after perfecting the appeal.

We deem it unnecessary to go into any lengthy discussion of the facts set forth in the affidavit disclosing the causes of the delay in this case. The affidavit, in its essential points, is sustained by exhibits attached to it, and we are satisfied that good cause has been shown for the delay. Both the parties, as well as the court, thought that a case and exceptions were necessary to review the action of the court in this case, and the delay in getting the case settled and verified resulted from the failure on the part of the Judge of the Circuit Court to settle and sign a case or exceptions or to act in any manner and from no laches in the parties. The judge may or may not have been excusable for this failure, but as it cannot be attributed to the neglect of the party, he should not suffer.

Second—Because the return here filed contains no case or exceptions.

This is an action which was originally commenced in a Court of Chancery, and the Code, Section 384, provides that

the Supreme Court shall review such a cause upon th
and the law. Under the chancery practice anterior
Code, this court reviewed chancery causes without a
exceptions or a case stated, while in actions at law, ir
to review any of the evidence produced on the trial,
necessary to embrace it in a bill of exceptions, and tha
bill be made a part of the record by the order of the
While the effect of the Code is to modify the practic
future actions, it does not so effect chancery causes p
when the Code was enacted. They are to be reviewe
the facts and the law as they appear from the record
in the court below. An appellant bringing up all th
ceedings of the court below, including the evidence ta
the case, is entitled to have a review of the law an
without a case or exceptions. This is the result of th
sions of the Court of Appeals in New York upon a
section of the Code of that State.

Motion denied.

THE STATE OF FLORIDA, ON INFORMATION BY THE A
NEY GENERAL UPON THE RELATION OF JAMES J.
LAND, VS. WILLIAM M. LEDWITH, SHERIFF OF
COUNTY.

The Constitution of this State provides that certain officers "may b
moved from office upon the recommendation of the Governor
consent of the Senate." This power being without limitation, th
dicial department of the government cannot create limitations
it. Neither notice to the officer, nor the making and proving
charge, is essential to its exercise. That an officer may be thu
moved is a constitutional incident or limitation upon his right to
the office, in the same manner as is the limitation of the term to
years, and to be thus deprived of the office without notice or hea

is not in conflict with that clause of the Constitution which provides that no person shall be deprived of his property without due process of law.

This is an information in the nature of a quo warranto against William M. Ledwith.

The facts are stated in the opinion.

E. M. L'Engle for Relator.

J. P. C. Emmons for Respondent.

WESTCOTT, J., delivered the opinion of the court.

The information in this case is upon the relation of James J. Holland, the adverse claimant, and is brought by the Attorney General. It charges Ledwith with a usurpation of the office of Sheriff of Duval county, both as against the people and the said Holland, who claims to have been properly appointed Sheriff of said county before the appointment of Ledwith, for a term that had not expired, and affirms that he had never resigned or been removed from the office. To this information the respondent has filed a plea, to which plea the Attorney General and relator have demurred.

The grounds of demurrer are that the plea does not allege and show that the relator was removed from office upon the recommendation of the Governor and consent of the Senate, according to the Constitution and laws of this State; that it does not state the specific ground or grounds of such removal; that it does not allege or state that the relator had due notice of any ground or grounds of removal, or that he had the opportunity of being heard thereupon, and from aught that appears to the contrary in said plea, the relator was deprived of his office by an ex-parte proceeding and without due process of law.

The facts alleged in the answer are that the Governor of the State of Florida, on the 29th of January, 1869, advised with and asked the Senate to consent to the removal of the

said Holland from the office of Sheriff of Duval county; that the Governor then assigned his reasons for desiring said removal, and at a subsequent time and on the same day, the Governor recommended and nominated for said office Daniel C. Rodman, and that the said Senate upon the same day consented to said removal of Holland and confirmed the said Rodman as said Sheriff of Duval county.

It is insisted that under the Constitution and laws of this State, the Governor and Senate cannot remove a sheriff except upon charges setting up some specific ground of removal, and after due notice, hearing and conviction of the matters charged. It was also insisted that a sheriff could not be removed except for willful neglect of duty or a violation of the criminal laws of this State, or for incompetency.

If either of these propositions be law, then this plea is not a sufficient answer to the information, as the information sets up a legal appointment of the relator, and the answer fails to set up such facts as are necessary to constitute a legal removal. The questions arising upon this demurrer are therefore—must the Governor set forth a particular ground for the desired removal of a sheriff? Can he be removed for any other than the causes above enumerated? Is it necessary to give him notice, and the opportunity for hearing before such removal by the Governor and Senate can be accomplished?

The Constitution of this State provides that the Governor by and with the advice and consent of the Senate shall appoint in each county a sheriff, who shall hold his office for four years. (Sec. 19, Art. VI.) It further provides that a sheriff "may be removed from office upon the recommendation of the Governor and consent of the Senate." This is the only provision of the Constitution which relates to the matter of removal in the case of sheriffs. It was insisted that the proviso in Sec. 19, Art. V, limited the power of the Governor and Senate in the matter of a removal of a sheriff. This whole section is as follows:

"The Governor shall appoint, by and with the advice and consent of the Senate, in each county, an Assessor of Taxes and (a) Collector of Revenue, whose duties shall be prescribed by law, and who shall hold their offices for two years, and be subject to removal upon the recommendation of the Governor and consent of the Senate. The Governor shall appoint in each county a County Treasurer, County Surveyor, Superintendent of Common Schools, and five County Commissioners, each of whom shall hold his office for two years, and the duties of each shall be prescribed by law. Such officers shall be subject to removal by the Governor when in his judgment the public welfare will be advanced thereby; *Provided,* No officer shall be removed except for willful neglect of duty, or a violation of the criminal laws of this State, or for incompetency."

The office of a proviso is to limit the operation and effect of what has gone before. This proviso here is a clause introducing a condition or limitation upon the power of removal previously granted to the Governor alone, and it relates only to "such officers" as are removable by the Governor alone without the consent of the Senate.

It cannot be denied that the sheriff has a property in his office, and it is true that he cannot be deprived of this property in his office except by due process of law. The difficulty here arises from misapprehensions as to the extent and measure of his property, and as to the true signification of the terms due process of law when applied to this property. When the sheriff acquired his office, his property in it (the term,) extended only to four years, for the simple reason that the Constitution so limited it. In the same manner and for the same reason, when he acquired that property, it was accepted with the qualification that he could at any time be removed by the Governor and Senate. If he is deprived of his office in accordance with the conditions of the Constitution and by the power which had this right, then he is not deprived of his property without due process of law, but ac-

cording to law. An event has simply happened which put an end to his property in accordance with his understanding when he acquired it, and he is no more deprived of his property without due process of law in the case of removal without notice, than he is in the case of the expiration of his four years without notice. The power of removal here granted to the Governor and Senate is without limitation, is absolute, and is beyond the control of the judicial department of the government. The only question which we can determine in such cases is, is there such a power in the given case? Whether the power exists is a judicial question. If it does exist,however, and is without limitation, then we cannot listen to the complaints of the appointee urging that it has been exercised in his particular case in a despotic manner, purely from prejudice, passion or hate; because even if this be so, it is the act of a power beyond our control and with which we cannot interfere.

Our conclusion is, that the Governor and Senate have, in the case of a sheriff, the absolute power of removal, which they can exercise without notice to the officer and without giving any reason for their act. either to the officer or to any other department of the government.

With these views, the plea is good and the demurrer is overruled, with leave to take issue upon the act of removal.

The relator thereupon replied, traversing the fact of removal, and by consent the issue of fact thus raised is referred to the court.

Respondent offered in evidence the following communications of his Excellency the Governor to the Senate:

EXECUTIVE OFFICE,
Tallahassee, Fla., Jan. 29, 1869.

TO THE SENATE:

I ask the consent of the Senate to the removal of the following named officers, for reasons stated, viz: * * *
James J. Holland, sheriff of Duval county, at the request o[redacted]

the Senator and Representatives, and upon charges of official delinquency. Very respectfully, &c.,

HARRISON REED, Governor.

EXECUTIVE OFFICE,
Tallahassee, Fla., Jan. 29, 1869.

TO THE SENATE:

I hereby nominate the following named persons for the offices severally designated, viz: * * * * * Daniel C. Rodman to be sheriff of Duval county in place of James J. Holland, removed.

Very respectfully,

HARRISON REED, Governor.

He also offered the Journal of the Senate of the 30th of January, 1869, in which the following action is stated:

"On motion the Senate went into Executive session.

"The following Executive nominations were confirmed: Daniel C. Rodman to be sheriff of Duval county *in place of James J. Holland, removed.*"

The relator offered no evidence.

Here we have a communication of the Governor to the Senate asking consent to the removal of Holland on the 29th, and a statement in the Senate Journal on the 30th, that another person is confirmed in place of Holland, "*removed.*" It is true that this entry does not state consent to the recommended removal in as accurate language as it might, but it is a statement by the Senate that the officer is removed and another appointed. The Senate, as a matter of course, knew that its own consent was necessary to a constitutional removal, and with the communication of the Governor before it recommending such action and nominating another person to the office. A statement by the Senate Journal that the party was removed and that it has confirmed the other person nominated to the same office, necessarily implies the consent of the Senate to the recommended removal.

We find for the respondent upon the issue, and there must be general judgment for the respondent.

LOUIS M. GAMBLE, RESPONDENT, VS. THE JACKSONVILLE, PENSACOLA & MOBILE RAIL ROAD COMPANY, APPELLANT.

Section 194 of the Code of Procedure, which provides that "in any action arising on contract, for the recovery of money only, the plaintiff may file with the clerk proof of personal service of the summons and complaint on one or more of the defendants, or of the summons according to the provisions of Section 81, and that no answer has been received; the clerk shall thereupon enter judgment for the amount mentioned in the summons against the defendant or defendants, or against one or more of several defendants, in the case provided for in Section 87," is not unconstitutional.

Appeal from the Circuit Court for Leon County, Second Judicial Circuit.

An action was brought in the usual form under the Code on drafts in favor of respondent drawn by the President and accepted by the Treasurer of appellant. Judgment was rendered by the clerk in vacation, under Section 194 of the Code, against the company for $432.00.

Counsel for appellant assign for error, " that the judgment in this cause, rendered in vacation by the clerk of the court below, is unconstitutional, unauthorized and void."

Peeler & Raney for Appellant.

We present but a single question, viz: Is a judgment by default, so rendered by the clerk in vacation, constitutional and valid? We maintain that it is not.

The powers of the government of this State are distributed into legislative, executive and judicial, and no person belonging to one department shall exercise any of the functions appertaining to either of the others, &c. Constitution, Art. 3, 196.

The judicial power is vested in a Supreme Court, Circuit Courts, County Courts, and Justices of the Peace. Ib., Art. 6, Sec. 1, 202.

No other courts than those herein specified shall be organized in this State. Ib., Art. 6, Sec. 18, 205.

We have here not only an investiture of the *whole judicial power* in certain *specified courts,* but an inhibition against the establishment of any other courts. Even in the absence of this inhibition, it is questionable whether the Legislature could vest any portion of the judicial power elsewhere. Cooley's Con. Lim., 90, Note 1.

The rendition of a judgment is a judicial act, and requires the intervention and exercise of judicial power through the appropriate court having jurisdiction of the cause. However much the authorities may differ in their reasoning upon other branches of this case, they are all agreed on this point.

As will be seen by reference to some of the authorities which we will cite, it is questionable whether a judge, as distinguished from the *court in session,* can render a judgment.

Section 8 of Article 6 of our Constitution gives jurisdiction to the *Circuit Courts* in certain cases, and afterwards provides that "the *Circuit Courts* and the *Judges* thereof shall have power to issue writs," &c., thus making a distinction between the *court* and *judge.* The difference between the *court* and the *judge* is admirably enforced in an able opinion of Mr. Story in the case of U. S. vs. Clark, 1 Gallison, 499.

But this point, it may be properly urged, does not arise here, neither the *court* nor the *judge* having had anything to do with the judgment rendered in this case.

The Clerk of the Circuit Court being a mere ministerial officer, in whom, under the Constitution, no part of the judicial power is or can be vested, a judgment rendered by him, which is a judicial act, is absolutely null and void.

The following authorities, we think, will sustain us in our position; State ex rel. City of Rockford vs. Maynard, 14 Ill. 419; Chandler vs. Nash, 5 Michigan, 409; Kenne-

dy ex parte, 6 Eng. (Ark.) 598; Hall vs. Mark, 34 Ill. 358.

The last case is directly in point. It decides the precise question here as to the validity of a judgment entered by a clerk under a law similar to the provisions of the Code under which this judgment is entered, and the court in an unanimous and able opinion, holds such judgments to be null and void.

We have sought for adjudications on both sides of the question, desiring to present it fairly and have but one case: Wells et al. vs. Morton, 10 Wis. 408.

In this case the court was divided, and we think the dissenting opinion shows clearly the law to be as held by the other courts.

T. W. Brevard for Respondent.

The objection taken to the judgment is that it was entered by the clerk in vacation, and in the absence of the judge.

It is claimed that the judgment being the end of suit, is a judicial determination of the matters of fact and law presented, and that as a consequence of this the entry of the judgment involves the exercise of judicial powers by the clerk, and that the judgment is void. We controvert the positions taken by the appellant. A judgment is the decision or sentence of the law given by the court or justice or other competent tribunal, as a result of the proceedings instituted therein for the redress of the injury. Bouvier's L. D. 1, 676.

The judgment is not the decision of the court, but the sentence of the law pronounced by the court. The premises of law and fact being admitted, the judgment follows as a necessary result. Where there is no issue, there can be no trial. The judge decides questions of law, the jury decide questions of fact.

But this judgment was entered where all the premises of

law and fact are admitted, and there was no issue. The act of the clerk, therefore, was ministerial, at a time when the court was deemed to be open for the purposes of the case. After the default, the case stood as after verdict.

Refer to Bouvier's L.D.1, 676; 2 Tucker's Com. 238, 316, 275; Stephens on Pleadings, 110; 10 Wis. 470.

RANDALL, C. J., delivered the opinion of the court.

An action was brought in the usual form under the Code, by the respondent, upon a draft drawn upon the Treasurer by the President of the Railroad Company and duly accepted. Upon the expiration of the time to answer, the defendant failed to answer, and judgment was entered by the clerk, in vacation, pursuant to Section 197 of the Code. From this judgment the defendant appealed, and the single question presented is, whether a judgment so entered by the clerk in vacation is constitutional and valid?

A judgment is defined in the books to be the decision or sentence of the law, pronounced or given by a court, upon the effect of proceedings instituted in or before the court.

At a very early day all the proceedings before the court were oral—the pleadings and the judgment or sentence—and the "court" was the judge who represented the king or the law. The plaintiff or complaining party "clamored" in open court, in person, against the defendant, who was brought in person before the judge to answer. The judgment pronounced by the judge against the defendant consigned him to prison, there to expiate the offence of being too poor to pay a sum of money,or of having trespassed upon the plaintiff's grass, but "in mercy" the defendant was discharged from duress upon his paying the sum or fine adjudged against him. If judgment went against the plaintiff, he was punished "for his false clamor." The progress of civilization has wrought great changes in the form as well as in the substance of civil jurisprudence, and now, with greater semblance of decency, the court is a depart-

ment, having its various officers of convenience, judges and juries, clerks and sheriffs. The pleadings and adjudications have become records; the stentorian voice of the judge is hushed to the mere scratch of a pen, and the gentlemanly clerk quietly attests the seal of authority which consigns the unfortunate suitor's goods and chattels to the auction block. And so the footprints of progress are discovered even in the chambers of Westminster.

By the terms of the Code, the clerk of the court is required to enter a judgment for the amount demanded, if the defendant, who has had personal service of the summons, fails to answer. Here two things required to be observed savor of judicial action, viz: a conclusion or judgment that service has been made, and that the defendant is in default, but the one is determined by reading the sheriff's return, and the other by the affidavit of the plaintiff's attorney, and both by the common rules of grammar. The only remaining fact to be ascertained is the amount due, which may be, by the simplest rules of arithmetic or the sworn statement of a party to an undisputed fact involving the exercise of no judicial discretion or black-letter principles. A sum of money being thus ascertained, *the law* directs that the clerk "enter judgment" in a book according to the recognized form. In all this, what is the necessity of a judge's presence? But it is said the idea of a *judgment* includes judicial power exercised by some one clothed with the necessary raiment, and that must be a person called a judge, because judges alone may exercise judicial authority, and therefore no judicial act may be done by a mere ministerial officer. This is the doctrine of the case cited by counsel for appellant, Hall vs. Marks, 34 Ill. 358. "The power to adjudge, determine and render a judgment is, beyond all question, a judicial act, and under this provision of the Constitution, [that no person being of one department shall exercise any power properly belonging to another department,] can only be done by a judicial officer. It belongs to that

department, and if exercised by either of the others, it is void." "The consideration of the facts, and the application of the law to those facts, and the conclusion deduced by the court from the law and the facts,constitute a judgment. The power to announce and have enforced this conclusion has been confided exclusively to the judiciary of our State government." * * "It would be a perversion of language to call a clerk of a court a judicial officer. He is attached to the judicial department, but is only a ministerial officer of a court. He is only the instrument the law has designated, for convenience and the dispatch of business, to record the determination and sentence of the court. Every order or judgment he can lawfully enter, is the judicial sentence of the court. He possesses no power to render a judgment, but only to enter it under the express or implied order of the judge in the exercise of judicial power." And so the court puts the case upon that provision of the Constitution which prohibits officers of one department of the government exercising any power properly belonging to another, and upon that ground concludes that a law authorizing the clerk to enter judgments by default in vacation was unconstitional and void. However correct may be the legal definition here given of judicial functions, I do not clearly see how the entry of a judgment of a court by the clerk of a court is the exercise by an officer of one department of government of the powers or duties pertaining to another department; and if it be considered in Illinois that the clerk of a court is an officer of some other than the judicial department of government, I see no escape from the conclusion that all the acts of the clerks of their courts done in connection with the judicial department are totally void, and no judgment or decree entered by a clerk of a court has any validity whatever, nor, according to the same logic is any judicial writ issued by a clerk of any value.

The issuing of an attachment or an execution, is an exercise of and an enforcement of the law through judicial pow-

er. According to the logic of the case cited, these writs cannot be issued by the clerk, nor can they be issued by any other than a judge. They further say that "the case is not similar to, nor does it depend upon the power of the clerk to record a *judgment confessed* in vacation. This is done by express authority from the debtor," &c., but I again confess that I cannot see the power of the clerk in any different light in the one case or the other; for the entry of a judgment, involving a consideration of the premises, of the parties, of the cause of action, and of the amount, and considering the conclusive nature of a judgment, requires equally the operation of judicial power in either case, and if a clerk may not enter a judgment by default in vacation because is of another department and thus prohibited by the Constitution, no act of the parties can avoid the effect of the inhibition.

If the entry of a judgment in one case is a judicial act it is equally so in the other, and no consent of parties can invest the clerk with the necessary judicial character. In the case from Wisconsin, (10 Wis. 469,) in which this section of the Code was considered and the judgment entered by the clerk sustained, the court says, if it be true that the Code attempts to transfer to the clerk a portion of the judicial power, "there can be no doubt these provisions are unconstitutional, and that judgments entered in pursuance of them are illegal and void;" but the court in that case sustained the judgment so entered by the clerk, upon the ground that the *court* is, in contemplation of the law, always present, and that the act of the clerk is but the act of the court. The practice of the courts in Great Britain ever since the system of written pleadings and proceedings were inaugurated, and in most of the American States, is cited as authority for the entering of judgments in vacation, with or without the actual presence of the judge. This practice has prevailed from the earliest period in the history of the States, and now prevails in the courts of the United States, the court being *con-*

sidered open upon certain "rule days," and judgments are taken whether the judge be present or not. In Virginia, New York and others of the elder States, it has always prevailed without question. Judgments of this character are of course subject to the supervisory control of the court or judge, and may be corrected or set aside like other proceedings of the court and its officers. I can discover nothing in the Constitution which prohibits the Legislature from making provision for the entering of judgments in vacation as well as in term time; nor that prohibits the Legislature from authorizing a trial by the judge of the issues in any case in which a jury is not required, and the entry of judgment in pursuance thereof by the clerk.

And granting all that may be claimed as to the judicial action involved in the entry of judgments by the clerk in vacation, upon default, there is no provision of the Constitution of this State opposed to the vesting of the necessary power in the clerk of a court and making his action therein the act, *pro tanto,* of the court. The judicial power of the State is vested in certain courts, and the Constitution provides for the appointment of a judge for each circuit and a clerk of the court for each county. It does not specially vest the judicial function in the judge, nor in the clerk, and the one is equally an officer of the judicial department with the other. Looking to the common definition of these offices, we conclude that the judge ordinarily pronounces the law and the clerk makes the record. We ordinarily recognize the "court" in the actual presence of the judge and clerk, yet we all know that interlocutory judgments and orders which, in contemplation of law, are the judicial acts of the court, have from time immemorial been entered of record by attorneys, solicitors and clerks, when in fact there was no judge of the court in existence, the statutes and rules having prescribed and regulated such proceedings, and parties

have been deemed bound by them as by the action of the court itself.

The Constitution empowers "the courts" to issue the necessary judicial writs, such as the summons, subpœna, execution, &c., in aid of the jurisdiction of the courts, but probably no lawyer questions the authority of the Legislature to confer the exercise of this power upon the clerk, who acts for and in the name of the court. The court is always present, always in existence, and if the judge be present or absent, suitors besiege it with complaints and declarations, pleas and demurrers, and the clerk receives the parchment and makes the entry in the record as an officer of the judicial department. The office of Master in Chancery is judicial. Even the Master of the Rolls was Master in Chancery, and we recognize him as second only in dignity and power in his department in England. Yet he was a mere clerk or keeper of records, the chief of twelve, who, on account of the increase of business, were permitted to employ other clerks, and grew into importance as aids to the chancellor, finally emerged into judicial existence from the mere convenience of the chancellor. There is nothing alarming in the character of the acts authorized by Section 194 of the Code to be done by the clerk. There is no controversy, no issue to be decided by an arbiter. One who understands plain English language and the rudiments of arithmetic, may correctly execute the simple directions of the law, though he may never have heard of Puffendorff. The clerk, upon a default, which he may discover by consulting the files, records the conclusion of the law as it is clearly pronounced through the prescribed rules of the court. He is, in fact, directed by the court, through rules enacted by the Legislature or adopted by the court, to enter a judgment upon the happening of events necessarily coming within his knowledge, and practically his duty is merely ministerial or mechanical.

In my judgment, the law authorizing the clerk to enter judgments upon default in vacation, is not in conflict with

the Constitution of this State, and as the judgment in this case was so entered in conformity with the law, it should be affirmed.

The judgment is affirmed.

HART, J., delivered the following concurring opinion.

An action was brought under the Code of Procedure on drafts in favor of respondent drawn by the President on and accepted by the Treasurer of the appellant. Judgment was entered by the Clerk of the Circuit Court under section 194 of the Code, against the appellant, for $432.00.

The part of said section which applies is as follows:

"Judgment may be had, if the defendant fail to answer the complaint, as follows: 1. In any action arising on contract for the recovery of money only, the plaintiffs may file with the clerk proof of personal service of the summons and complaint on one or more of the defendants, or of the summons according to the provisions of section 81, and that no answer has been received. The clerk shall thereupon enter judgment for the amount mentioned in the summons against the defendant or defendants, or against one or more of several defendants in the cases provided for in section 87."

It is contended for the appellant that this section of the Code is unconstitutional, because it provides for the performance of a judicial act, involving several judicial determinations, by one who is not a judicial officer, and the Constitution is appealed to wherein in Sec. 1, Article VI, it declares that "the judicial power of the State shall be vested in a Supreme Court, Circuit Courts, County Courts, and Justices of the Peace." In section eighteen of the same article, that "no other courts than those herein specified shall be organized in this State," and in article three, that "the powers of government of the State of Florida shall be divided into three departments, Legislative, Executive and Judicial; and no person properly belonging to one of the departments shall exercise any functions appertaining to either of the others,

except in those cases expressly provided for in this Constitution." On the other side it is contended for the respondent that such acts are not necessarily judicial, within the true meaning of those parts of the Constitution, and are lawfully directed by the statute in question to be performed by the clerk.

In behalf of the appellant the case of "The State ex rel., city of Rockford vs. Maynard," 14 Ill., was cited as a leading case. There, as here, the constitution vested the judicial power of the State in one Supreme Court, in Circuit Courts, in County Courts and in Justices of the Peace, and it also provided for the election of the latter for four years. The Governor, as directed by statute, commissioned Maynard elected mayor of the city for a year, a justice of the peace for one year from the date of his election as mayor. A suit was brought before him for a penalty for violation of a city ordinance requiring labor on streets or commutation in money, and judgment was rendered against defendant for penalty and costs. Maynard afterwards refused to issue execution, and the Supreme Court denied a petition for mandamus to compel him to do it, on the grounds that he could not as mayor hold the office of justice of the peace, not belong to any of the courts holding the judicial power of the State. He was some other official than a judge or other officer of any of those courts. Next the case of Chandler vs. Nash, 5 Mich., 409, in which, under similar constitutional provision, a statute giving undisputed judicial powers to a notary public was held to be unconstitutional. Next, ex parte Kennedy, 6 Eng., (Ark.) 598. There the jurisdiction of all matters of equity was by the constitution vested in the Circuit Court, and an injunction had been ordered by a Master in Chancery and issued by the clerk. A statute authorizing it was held to be unconstitutional. Next and most relied upon, the case of Hall vs. Marks, 34 Ill., 358, where the constitutional provisions are substantially the same, the statute the same, except in not appearing in this is

report to authorize the clerk to enter judgment in vacation, but stating that judgment may be entered by him. The summons had fixed no time for answer, and there does not appear to have been any rule of court like ours from which could be fairly intended the presence and order of the court.

In behalf of the respondent was cited the case of Walls vs. Morton, 10 Wis., 470, where this very point is decided in favor of the constitutionality of the act, with an able dissenting opinion by Justice Paine. For respondent was also cited the practice in the United States District and Circuit Courts for the Northern District of Florida for many years.

The precedents nearly or precisely in point are few and divided. The constitutionality of the practice does not appear to have been much questioned, though prevailing in several States having similar constitutional provisions for many years. It prevails in England, where they are quite as careful in such matters as any pleople can be to keep the judicial department separate and independent. There can be no reasonable doubt that clerks of courts are officers of courts, created and their appointment provided for in, and some of their duties prescribed by the Constitution itself, (see Art. VI, Sections 6, 17, 19, Art. XIV, Sec. 6,) and that they properly belong to the judicial department; that the judicial power of the State is vested in the courts, aud that the Legislature has no authority to pass a statute in conflict with the true meaning of the Constitution.

The section of the Code in question is not the only one requiring the Clerk to enter judgments without the real presence and participation of the Judge. In cases of trials of facts by the courts, their decisions in writing may contain only statements of the facts found, must be filed with the clerks within a certain number of days after term, and then judgments upon the decisions are to be entered accordingly. See section 213. Who ascertains the amounts of the judgments? The Judges may or may not, and if not, the clerks

must, and they are intended as the judgments of the cou
In cases of judgments by confession, the Judges have noth
whatever to do with them. The examination of the pap
in order to ascertain whether or not they come up to
requirements of the Code, in such cases made and provic
are made by the clerks, who thereupon enter up the ju
ments. Should a clerk discover that clearly the papers
not such as the statute requires him to enter up judgm
upon, (and this would be scrutiny and consideration of
contents,) what might he lawfully do? Postpone his act
until the papers should be corrected and then enter
judgment? It appears to be conceded that the statute
thorizing the clerks of the courts thus to enter such ju
ments is constitutional, and they are judgments of
courts. It is entered up upon a direct confession, necessa
scrutinized and considered by the clerk. The judgm
in question in this case was also entered upon a confessi
though indirect, yet a virtual confession, *nil dicit.* If,
the one case, the proceeding was constitutional, and in
other not, the difference and the force of the reasoning
considering it so are not seen.

It is thought also that the thirty-seventh rule of the C
cuit Courts, by providing that the courts are always open
such purposes, makes such judgments the acts of the cou

True, arguments can be and have been made upon b
sides of the question. Some tend to show the requirem
of the Constitution to be a heavy and useless burthen u
the Judge, (who constitutes the court,) and others a reas
able mode of exercising his authority by one of his const
tional officers at a moment of his actual temporary abse
but constructive presence, a mere saving of time and trou

Such judgments may be said to be as much the acts of
courts as is the administering of oaths by clerks in reces
witnesses to testify before grand juries, the Judges being
of the court room; on the calling of the petit jury at n
night and receiving a sealed verdict, and the dispersing

the jury, in court ordered to be kept open for that purpose, and the adjourning of the court, the Judge being asleep.

The experience of ages has recognized such judgments as being the acts of the courts, not universally, it is true, for human laws vary as much as men, their authors, do, but enough to prove that they may with satisfactory reason be held to be no substantial departure from constitutional authority for the Legislature to authorize them.

The judgment of the Circuit Court should be affirmed.

ABRAM FORCHEIMER VS. ELI P. HOLLY.

1. A defendant, by availing himself of the leave of the court to amend answers which have been pronounced insufficient in law upon demurrer, elects to change his defences, and the sufficiency of the original answer as a defence to the action is not brought up for review by this court upon an appeal ftom a final judgment rendered for the plaintiff upon the amended answer.

2. That the return fails to disclose any issues of fact or law upon the amended answer thus filed will not be sufficient cause to reverse the judgment where the matters set up in the amended answer are not sufficient answers to the complaint, and the judgment will be affirmed if there is no error in other respects.

3. That the consideration for a contract was Confederate notes does not render the contract illegal. Such notes had an actual value, were a good and legal consideration for an ordinary commercial contract, and in the absence of any actual intent or purpose to aid the persons resisting the authority of the United States, the contract should be enforced by the courts to the extent of its just obligation.

4. The Constitution of this State provides that "all notes given in consideration of treasury notes of the so-called Confederate States are hereby declared null and void, and no action shall be maintained thereon in the courts of this State." This clause, impairing the obligation of a contract, and being an attempt upon the part of the State to exercise

a power which is prohibited by the express limitations of the Constitution of the United States, the supreme law, is void.

5. The general government being powerless to regulate the course of justice and prescribe rules of evidence in the State courts, Congress cannot constitutionally require that contracts shall be stamped as a condition precedent to their being admissible as evidence in the State courts.

6. A plea setting up a tender of Confederate notes during the war is available for no purpose.

7. When a tender is pleaded in bar of the action, the want of a *profert in curia* of the money tendered is fatal.

This is an appeal from a judgment rendered in the Circuit Court of the First Judicial Circuit in Santa Rosa county.

A statement of the case is contained in the opinion of the court.

John Chain for Appellant.

Geo. G. McWhorter for Respondent.

WESTCOTT, J., delivered the opinion of the court.

This was an action by the payee against the maker of the following promissory note:

$500. MOBILE, MARCH 23d, 1864.

One day after date I promise to pay to A. Forcheimer, or order, five hundred dollars, value received. Negotiable and payable at the Mobile Savings' Bank.

E. P. HOLLY.

To the complaint describing this note as the cause of action, the defendant, Holly, filed two distinct answers—one consisting of five grounds of defence—the other of two. The plaintiff, Forcheimer, demurred to each of the answers and to the several matters of defence therein set up. This demurrer the court sustained, with leave to defendant to file an amended answer instanter. The defendant availed himself of this leave and filed an amended answer. The order

of the court sustaining this demurrer is the first error assigned here by the appellant.

The defendant, by amending his answer, elected to change his defence and not to rely upon matters set up in his first answer. If it was his desire to rest his case upon these defences, he should not have availed himself of leave to amend them. He should have submitted to a final judgment, and on appeal from that judgment all the questions raised by the demurrer would have been presented to this court. When a pleading under the circumstances here disclosed is amended, the original pleading ceases to be a part of the record, because the party has elected to make the change. 18 New York, 496. Plaintiff's demurrer being thus sustained, with leave to defendant to amend, he filed an amended answer. The return now before the court shows neither a reply, which in some cases may be required, (Code, Section 103,) nor demurrer to this amended answer, the entries following the amended answer being a verdict of the jury for the the plaintiff and a judgment in his favor for the amount of the verdict. The following memorandum attested by the judge presents the only questions involving a consideration of the testimony and arising upon the trial, which we can consider:

"In this case, plaintiff offered as evidence an unstamped note for five hundred dollars, given by defendant to plaintiff, to the admission of which defendant objected as forbidden by act of Congress. The court held that Congress could not prescribe rules of evidence for State courts, and admit the note as evidence. To which ruling the defendant excepted. The defendant offered to prove that since the close of the war he had offered to pay said note in legal United States currency, at a specified rate as compared with Confederate currency, which plaintiff refused to accept, but the witness being questioned by the court as to any actual proffer of money by the defendant, stated that there had been no such proffer. The court held that the proposed evidence

was inadmissible to show a legal tender. To which ruling the defendant excepted."

These rulings being excepted to, are assigned here as error. The act of Congress fixing stamp duties enacts that such a contract as this note shall not be used as evidence in any court, until a legal stamp denoting the amount of tax shall have been affixed thereto as prescribed by law. Some of the courts hold that this act, not applying in terms to the courts of the several States, can have full operation if it is construed to apply to those courts only which have been established under the Constitution of the United States by acts of Congress. Thus construing the act, they hold that it does not relate to the State courts. Some State courts have sustained the act in its broadest construction, while others, admitting that its language and intent embraces State as well as Federal courts, deny the power of Congress thus to prescribe rules of evidence to govern the State courts, holding that the general government is as powerless to regulate the course of justice and rules of evidence in the State courts as the State courts are powerless to interfere with the subjects and rights exclusively confided to the courts of the United States, and that neither can thus interfere with the course of justice in the courts of other. 45 Ill. 29; 97 Mass. 452; 1 Bush., 239.

Our views are expressed by the Supreme Court of Illinois, when disposing of the same question in a case before it. That court says, "If our system of government is to remain as the wise and good men fashioned it, a strictly federative system, the States sovereign over all subjects within their proper sphere of action as the general government is over all subjects confided to it by the Constitution, then no power exists in Congress to declare by law what shall or shall not be evidence in a State court, and what domestic contracts made by the people of the States in virtue of their own laws, and having no connection with the Federal gov-

ernment, shall be valid." 45 Ill. 30. There was no error in admitting the note without a stamp.

As to the other ruling assigned for error, the witness admitted that there was no actual proffer of the money. What occurred was simply a proposition to pay what defendant thought he should pay. This is the evidence as stated by the judge.

The plea under which this evidence was offered was available for no purpose, as it was not accomplished with a *profert in curia* of the money. Where there is no profert, a plaintiff, even after issue and verdict for defendant, would be entitled to judgment *non obstante veredicto.*

What we have said disposes of everything occurring in the trial which this record presents for our consideration. This case and exceptions verified by the judge and just considered, and the final judgment upon the verdict, are the only actual *determinations* by the court which this return presents. This record shows neither issues of fact nor law upon the several defences set up in the amended answer. There is neither reply nor demurrer to it, and yet there is a general verdict of the jury upon issues of some kind which they considered.

Under the Code there are cases in which neither a reply nor demurrer is necessary. Whether in this case either was essential we do not determine, as in the view we take of the case, it is not necessary to decide that question. If the matters set up in this amended answer amount to no defence, it is plain that the judgment should be affirmed here. It certainly cannot be correct practice to send a case back to try issues either of law or fact which can amount to nothing, and when the only result can be an affirmance of the judgment now in the return before us. With this view, we examine very briefly the several matters of defence set up in this amended answer. The first defence is that the note was made by the defendant and delivered to the plaintiff in the State of Alabama, where the contract was made, and

where the consideration for which it was so made and delivered was at the time, and where the said plaintiff and defendant were then domiciled, and where the defendant has ever since resided and is now residing. These facts constitute no defence to the action.

The second defence is that the consideration for which the note was given was Confederate Treasury Notes, and that the note described in the complaint was to be paid in the same notes. There have been two conventions of the people of this State since May, 1865. Each convention passed ordinances or inserted provisions in the State Constitution in reference to contracts of this character. The first convention passed "an ordinance in reference to contracts made during the late war," which authorized proof to be admitted as to the character and value of the consideration in such contracts, and directed the courts to instruct juries to find according to the proof in this respect. This ordinance has been sustained by this court in one case and construed in another, (11 Fla. 292. 12 Fla, 532,) and while I am now and always have been of the opinion that it in effect destroyed the contract of the parties and made a new one, directing as it did that the party holding the obligation should receive *what a jury thought was the value of the consideration* which he had received, instead of the amount, or value of the amount, fixed and agreed *upon by the parties themselves,* yet it has been sustained and construed by this court as before stated, and the matter is not now an open question. The second convention inserted a section in the State Constitution which provided that all notes given in consideration of treasury notes of the Confederate States, "are hereby declared null and void, and no action shall be maintained thereon in the courts of this State." The Constitution having previously vested jurisdiction of this class of contracts in the Circuit Courts, a consistent construction of the jurisdiction clause, and this clause, requires us to hold that the terms, "no action shall be maintained," relate to the right

of action in the party, and not to the jurisdiction of the court to hear and determine the action; that it is an attempt by the convention by virtue of its conceived power over the right of action in the party to destroy that right.

If this provision of the present State Constitution is in conflict with the limitations upon the power of a State, contained in the Constitution of the United States in reference to contracts, it is void, and the rule left to determine the rights of the parties is that prescribed by the previous convention, as interpreted and sanctioned by the courts. If the fact that the consideration upon which this contract was based was a loan of Confederate notes, did not render the note void and destroy the right of action in the payee thereof anterior to this action of the State Convention, but on the contrary the law gave him the right to enforce the contract, then this clause of the Constitution denying the right of action upon this note impairs its obligation and is void. Does the fact that the consideration for this note was Confederate notes render the contract illegal? Does the simple fact of the parties thus dealing in these notes and accepting them as a consideration for a contract render such contract an illegal contract, which the courts should not enforce?

Confederate notes during the war were the only medium of exchange or representative of values then in general use by the people inhabiting a large portion of the country. Having an actual value, and being available as a medium of exchange, there can be no objection to sustaining contracts based upon them, unless the facts attending the issue and use of these notes render the contract illegal and void. We think this question is settled by the reasoning and the principles established in the case of Thorington vs. Smith, lately decided by the Supreme Court of the United States. (8 Wall., 11.) The court, in that case, says, "While the war lasted, these notes had a certain contingent value, and were used as money in nearly all the business transactions of many millions of people. Contracts stipulating for payment in this

currency were transactions in the ordinary course of civil society, and though they may have indirectly and remotely promoted the ends of the unlawful government, yet if entered into without any actual intent to further invasion or insurrection, were such contracts as should be enforced to the extent of their just obligation."

The precise question raised in the case now before the court is the legality of a contract where the value received, as the consideration for its obligations, is Confederate notes. It is not pretended that the making of this note was anything more than an ordinary commercial transaction, or that the contract was entered into with any actual intent to promote insurrection or invasion. According to the reasoning of the case just referred to, and in perfect accord with the plainest principles of natural justice, we cannot hold otherwise than that the consideration was lawful, being a thing of value capable of use and exchange for commercial commodities, and that the contract was legal and of binding force, no actual intent to aid invasion or insurrection being entertained by either of the parties. This clause in the Constitution, which attempts to destroy the binding force and obligation of this contract, is therefore void, and the rights of the parties are such as were fixed by the ordinance of the convention of 1865, before referred to.

In this case we must presume that the provisions of that ordinance were enforced, and that the judgment in this respect is correct and in conformity to the law of the contract as fixed by the previous decisions of this court. The judgmeet is regular, and no portion of the testimony which is verified by the judge shows that any other rule was applied.

The third defence in the amended answer sets up a tender of Confederate notes during the war. These notes were never a legal tender in contracts between individuals under the regulations prescribed by the powers actually occupying the territory in which they were a medium of exchange, nor

have they occupied any such position under the laws of the United States.

The fourth and last defence sets up a tender of United States currency since the war. The plea of tender here is in bar of the action. It is not pleaded with a *profert in curia* of the money. This omission is fatal. 17 Mass. 392; 1 Fla. 319.

The judgment is affirmed, with costs.

DECISIONS

OF THE

Supreme Court of Florida.

OCTOBER TERM, 1872.

ALEXANDER CUNNINGHAM vs. JAMES F. TUCKER AND OTHERS.

Orders allowing injunctions and appointing receivers are subjects of appeal to the Supreme Court, according to the statutes of this State.

Appeal from the Circuit Court for Duval County, Fourth Judicial Circuit.

This is a motion to dismiss the appeal in this case. The grounds of the motion are set forth in the opinion of the court.

Call & Basnett for the motion.

H. Bisbee, Jr., and *J. J. Finley* against the motion.

RANDALL, C. J., delivered the opinion of the court.

This is an appeal from an order of the Circuit Court, Fourth Circuit, granting an injunction and appointing a receiver.

The respondent now moves to dismiss the appeal, on the grounds that no notice of appeal had been served or security given as required by law, and that the order is not one from which an appeal can be taken.

The first grounds, the absence of evidence of service of notice of appeal, and the failure to give the necessary un-

dertaking, are evidently the result of misapprehension. The return discloses due notice of appeal with the admission of service by respondent's attorney, and by the clerk indorsed on it, and also an undertaking duly executed and approved, all which were filed in the clerk's office within two days after the signing of the order appealed from.

As to the other ground, that the order is not one from which an appeal may be taken, it is sufficient to remark that in our judgment such orders were the subject of appeal under the provisions of section 3 of an act relating to writs of error and appeals, approved January 7, 1853. (Laws of 1852 -'3, p. 100,) which act has not been repealed, as we have heretofore had occasion to hold. (Schultz vs. Pasific Insurance Co., 14 Fla., 73.) Nor are we satisfed that such orders are not appealable under the provisions of sec. 10 of the Code, but if any doubt existed in that respect, it was removed by an act amending section 202 of the Code, approved January. 27, 1871, which says that "Appeals may be taken from all such interlocutory as well as final orders and judgments in like cases, as appeals could be taken before the passage of the act to which this is an amendment." (sub. 2 of section 7.)

The motion to dismiss the appeal is denied.

DECISIONS

OF THE

Supreme Court of Florida,

JANUARY TERM, 1873.

ALEXANDER H. CUNNINGHAM vs. JAMES F. TUCKER, MINNIE T. TALLMADGE AND JOHN L. CLAY.

1. The act of November 25th, 1828, (Thompson's Digest, 183,) declaring mortgages upon personal property not "effectual or valid to any purpose whatever," unless recorded in the records of the county where the property is at the time of the execution of the mortgage, &c., is not applicable to mortgages upon vessels owned within the United States; such mortgages and the record thereof are to be considered with reference to legislation by the Congress of the United States within the powers of Congress respecting the "regulation of commerce."

2. The allegations in a complaint or in the accompanying affidavits filed upon an application for injunction and receiver, should show by direct and positive statements the facts entitling the party to the relief prayed and to the exercise of the summary process of the Court, and not merely upon information and belief unsupported by other evidence. The exception to this rule is that a preliminary injunction is sometimes allowed upon allegations founded upon information and belief, until, under an order to show cause, a hearing can be had and better evidence adduced.

3. The rule prohibiting attorneys at law from becoming sureties in attachment, appeal, &c., does not prohibit them from executing bonds or undertakings as principals in behalf of parties.

Appeal from the Circuit Court for Duval County, Fourth Judicial Circuit.

The statement of the case is contained in the opinion of the court.

Call & Basnett for Appellants.

H. Bisbee, Jr., and *J. J. Finley* for Respondent.

RANDALL, C. J., delivered the opinion of the court.

This is an appeal from orders of the Circuit Court of Duval county, allowing an injunction and appointing a receiver. It appears by the complaint that the plaintiff seeks to foreclose a mortgage upon a steamboat called the *George,* executed at the city and State of New York, by defendant, Tucker, to the plaintiff, to secure several thousand dollars mentioned in a certain promissory note. The complaint alleges that the mortgage was recorded in the office of Collector of Customs in the city of New York, where the boat was at that time.

After answer by the defendants, Clay and Tallmadge, and a demurrer on the part of Tucker, an injunction was allowed, and a receiver appointed to take charge of the property. The injunction restrained the defendants from interfering or intermeddling with the steamboat, &c.

It is insisted by the defendants that because the mortgage mentioned in the complaint, (the execution of which is however, denied,) if executed at all, was made in the State of New York, and that the "home port" of the steamboat was Cedar Keys in Florida, and because the mortgage was not recorded in the records of any county in this State, that by the laws of this State (act of Nov. 25, 1828, Th. Dig., 18[illegible] sec. 4,) the mortgage was not "effectual or valid to any purpose whatever, unless such mortgage shall be recorded in the office of records for the county in which the mortgaged property shall be at the time of the execution of the mortgage, unless the mortgaged property be delivered, &c. This statute, whatever might be thought of it with regard to mortgages executed within this State, is probably inappli-

cable to mortgages executed elsewhere. It is impossible to apply it to a mortgage executed in New York upon property in New York, which may be subsequently removed to this State.

But a mortgage upon this kind of property must be considered with reference to the legislation of Congress, if Congress has legislated upon the subject.

The Supreme Court of the United States has decided (7 Wallace, 646,) that legislation in regard to the sale, mortgage, conveyance, &c., of vessels of the United States, is within the powers of Congress respecting the "regulation of commerce," and that such legislation by Congress must prevail against any State law on the subject. The act of Congress of July 29, 1850, (9 Statutes at Large, 440, section 1,) provides, that "no bill of sale, mortgage, hypothecation or conveyance of any vessel, or part of any vessel, of the United States, shall be valid against any person other than the grantor or mortgagor, his heirs and devisees, and persons having actual notice thereof, unless such bill of sale, mortgage, hypothecation or conveyance be recorded in the office of the collector of the customs where such vessel is registered or enrolled."

This act must be held to supercede any statute law of the State with reference to this species of property, and the mortgage held to be "effectual and valid" as against the mortgagor and others having actual notice of its existence, whether recorded or not, and good as against all the world if it be recorded as required by the act of Congress.

The complaint states that the defendants, Tallmadge and Clay, had notice of the mortgage at the time of their purchase, and that the defendant, Tucker, was the mortgagor, and it alleges, upon information and belief, that the purchase respectively by Clay and by Tallmadge was without consideration, and their respective titles merely colorable. The defendants, Clay and Tallmadge, deny that they had knowledge or notice of the mortgage at the time of their

respective purchase, and allege that such purchases were *bona fide* and upon good and sufficient consideration.

Clay answers that he purchased from Tucker in 1870, and that the property was delivered to him with a bill of sale. Tallmadge answers that she purchased the steamer at a sale by a receiver, appointed in a proceeding before the Circuit Court for Duval county. The execution of the mortgage by Tucker is denied by them. The steamer, at the time of the commencement of this suit, was at Jacksonville, Florida.

The grounds upon which the injunction was prayed and the receiver appointed were, that the money mentioned in the mortgage had been long due and unpaid; that the property was depreciating in value; that liens for seamen's wages were accumulating against it, and that there was reason to believe that the defendants would remove the steamer beyond the jurisdiction of the court, and that they are insolvent.

All the material allegations in the complaint and in the affidavits submitted on the part of the plaintiff as grounds for the orders appealed from, are upon the information and belief of the affiants, except as to the execution and recording of the mortgage and note, and the amount due, and that the property was depreciating in value. All the material allegations of the plaintiff were denied by the answers and affidavits on the part of the defendants, which were filed prior to the making of the orders.

The Code of Procedure does not change the rule as to the character of the evidence required, upon an application for an injunction, from that which was required under the former equity practice. It must "appear satisfactorily to the Judge that sufficient grounds exist" for making the order. The facts showing the plaintiff's right to the relief and to injunction should be stated in the bill or accompanying affidavits in direct terms, and not upon information and belief alone. This has long been the settled rule in equity proceedings. The only exception to the rule is that a pre-

liminary injunction is sometimes allowed upon allegations founded upon information and belief, until, under an order to show cause, &c., a hearing can be had, and proper evidence adduced.

The defendants, Clay and Tallmadge, not only deny the execution of the mortgage and the recording of it, but deny all knowledge or information of its existence at the time of their several purchase of the steamer. There are no proofs submitted to show the truth of the plaintiff's allegations. It, therefore, could not "appear" that the plaintiff was entitled to the relief demanded.

Moreover, the plaintiff's complaint does not show that the mortgage is good as against subsequent purchasers without notice. The complaint alleges that the mortgage is recorded in the office of the collector of customs in New York, but it fails to show that New York was the "home port" of the steamer or the place "where the vessel is *registered* or *enrolled*," as required by the act of Congress. The answers state that the steamer is registered at Cedar Keys. As the case stood before the Circuit Judge, the plaintiff was not entitled to the relief demanded as against the purchasers of the property, and therefore no order for injunction or receiver should have been made.

It is unnecessary, in disposing of this case, to notice any of the other questions submitted. It was objected that the bond or undertaking was signed by an attorney-at-law contrary to the positive rule of the Circuit Court. That rule, however, refers to attorneys signing as *sureties* of parties. There is no objection to their signing bonds or undertakings as *principals* or in behalf of parties. The rule is one which should be strictly construed. See 5 Fla., 280; 12 Fla., 144.

The order of the Circuit Court for Duval county allowing an injunction and appointing a receiver in this case is reversed and set aside, and the cause remanded for such proceedings as may be had therein according to law, and the rules and practice of the court.

CALVIN L. ROBINSON, ET AL. VS. PETER JONES, ET AL.

The right to be a municipal corporation is a franchise which the State may grant or withhold at its pleasure. The right to file an information in the nature of a *quo warranto*, or to institute a civil action to arrest a usurpation of such a franchise, does not belong to the individual citizen. The right to institute such proceedings against an existing *de facto* municipal corporation is in the State, and the institution of the action is a matter in the discretion of the Attorney General.

Appeal from the Fourth Judicial Circuit, Duval Cou

A statement of the case is found in the opinion of court.

Call & Basnett for Respondents.

A. A. Knight for Appellants.

WESTCOTT, J., delivered the opinion of the court.

The plaintiffs in this complaint seek a judgment perpe ally enjoining the defendants from exercising any corpor rights, franchises or privileges appertaining to a munici corporation; that the defendants have associated themselv together as a municipal corporation, under the name of t city of Jacksonville, and are exercising the franchise of municipal corporation, without having been first duly incor porated, are the general facts set forth as the ground for th relief thus demanded.

The other facts alleged are merely the acts set forth a evidence of the existence of these general facts or conclu- sions. To this complaint a demurrer was interposed by th defendants. Among the grounds of the demurrer are th following: "That there is a defect of parties plaintiff to th suit, the State of Florida being a necessary party," and tha "the complaint does not state facts sufficient to constitute cause of action." This demurrer was overruled, the defen-

dants excepted, and upon appeal this judgment is brought here for review. The demurrer in this case, it will be perceived, therefore raised this question. Admitting these two facts, that the defendants are not only incorporated as alleged and that they are in the actual exercise of municipal corporate functions as the city of Jacksonville, have the plaintiffs the right to a perpetual injunction against them prohibiting the exercise of the right and franchise to be a municipal corporation? We examine this question in two aspects. What was the rule before the Code? What is the rule since its enactment? This complaint is against *"certain individuals for claiming to act as a corporation."* It is brought by *other individuals* who seek to enjoin the persons so claiming the right to act, and acting as a corporation from so acting upon the ground that they were never duly incorporated. Anterior to the Code, the remedy for this wrong was in a court of law, through the instrumentality of an information in the nature of a *quo warranto*. Such a case depending entirely upon the solution of a dry legal question, the proper and exclusive forum for its determination was a court of law. *The process of injunction could not have been invoked even by the Attorney General in behalf of the State in such a case.* 17 Ves. 491; 2 Kent Com. par. 313, page 367, 8th edition; 24 Ala. 401; 22 Iowa 75. Says Chancellor Kent: "This remedy must be pursued at law, and there only." It is unnecessary to say anything more as to the remedy.

We next inquire where and in whom *was the right of action* under the state of facts here disclosed? At common law no such right of action existed in the individual corporator or subject. The right to be a municipal corporation did not emanate from individuals, but from the crown. It was a franchise of the crown which was withheld or granted at pleasure, depending in no sense upon the assent of the subject. The rule was that the right to file such an information against an existing *de facto* corporation claiming the

right to, and actually exercising the franchises and powers of a municipal corporation, was only in the crown through its proper officer. Rex vs. Ogden et al. 10 B. & C. 230. Cole on Informations, par. 124, page 97. It is true that whenever the corporation exceeded its powers, committing any trespass or wrong against an individual, there the individual has his right of action either at law or in equity, according as the nature of his injuries might indicate the one or the other to be the proper forum, but he had no right to go beyond this and to assume to correct a general usurpation of a franchise of this character upon the ground that the individuals claming the franchise were not duly incorporated. So, in this country, the right to be a municipal corporation does not emanate from the citizen. It is a franchise which the State grants or withholds at its pleasure; nor does the existence of a municipal corporation necessarily depend upon any assent of the persons inhabiting the locality proposed to be invested with such franchises, powers or duties. This is a matter of pure legislative discretion, as it is entirely within the power of this department of the government to force that capacity upon such persons by positive legislation to that effect. We thus see that before the Code the process of injunction could not be invoked in such a case by either the citizen or representative of the crown or State; in other words, that it was a wrong remediable exclusively at law. We also see that the right of action, the right to demand judgment of ouster or forfeiture in such a case, existed only in the crown or State, to be put in motion by the officer of the crown or State at his discretion, and that no such right existed in the citizen or individual corporator.

What effect has the Code upon the remedy, as well as the right of action, as we have defined them, is the only remaining question.

First—As to the matter of the remedy.

The general purpose, intent and effect of the Code is to regulate the practice through which existing legal or equita-

ble rights are to be enforced, and not to confer additional legal or equitable rights. As to the matter, of injunction, the remedy sought to be invoked here, the rule of the Code is that whenever any specific provision of the Code sanctions an injunction, there it can be invoked whether authorized by the antecedent practice or not, and whenever no specific provision sanctions an injunction, there it cannot be granted, unless sanctioned by the antecedent law controlling the subject. Applying this rule to the present case, we find nothing in the Code upon the subject of injunctions which would authorize or sustain the court in granting the relief demanded in this case.

Second—What effect has the Code upon the right of action? Has it changed the common law upon the subject, so far as it is involved in this case?

The Code provides that the remedies heretofore obtainable by proceedings by information in the nature of a *quo warranto*, may be obtained by civil actions under the provisions of this act. What are the provisions of this act (the Code) with reference to the action to be instituted to correct the wrong set up in this complaint?

The Code provides that "an action may be brought by the Attorney General in the name of the State, upon his own information, or upon the complaint of any private party when any association or number of persons shall act within this State as a corporation without being duly incorporated." Code, Sections 359, 363.

This is the case made by this complaint. The effect of the Code is simply to affirm and to continue the common law rule as to the right of action, at the same time authorizing that right of action to be asserted through the instrumentality of a civil action under its provisions. We have heretofore held that the Code does not in such a case as this exclude or abolish the remedy by information. It simply permits the remedy before obtained through that process alone, to be obtained by the additional method of a civil ac-

tion. The Code does not operate to vest this right of action in the individual in a case of this kind. The Supreme Court of New York, in the case of the People vs. the Attorney General, (22 Barb. 117,) use this language in reference to an action under this provision of the Code: "Although private rights are more or less involved in the action, yet it is in substance as well as in form an action in behalf of the people. It must be prosecuted in their name and by the officer whose duty it is to protect their rights. The language of the statute, too, is guarded. An action *may* be brought by the Attorney General. It is permissive. The power merely is conferred. It is for him to determine whether a fit case is presented. The only remedy is by an action in the name of the people." Here the action should be brought in the name of the State to comply with the letter of the Code and the Constitution, and in the State in a case of this kind the right of action only exists.

There are several objections made to the complaint which we have not considered. The view we take of the merits renders it unnecessary.

Our conclusion is that the complaint does not state facts sufficient to constitute a cause of action in the plaintiffs; that the facts set forth, if they show any cause of action, show a cause of action in the State; that the court has no authority to make the State a party plaintiff except upon the motion of the Attorney General, as the institution of any action by the State is entirely in his discretion in a case of this kind, and he is not subject to judicial control in its exercise.

The judgment of the Circuit Court overruling the demurrer is reversed. The case is remanded, with directions to enter a final judgment sustaining the demurrer and dismissing the complaint.

CALVIN L. ROBINSON vs. WILLIAM H. DUPRAY.

The "act concerning Forcible Entry and Detainer" was not repealed by the Code of Procedure; the proceedings regulated by that act are "special proceedings" within the meaning of the Code.

Appeal from the Circuit Court for Nassau County, Fourth Judicial Circuit.

The facts constituting the basis of the opinion are stated therein.

Robert Smith for Appellant.

John Friend for Respondent.

RANDALL, C. J., delivered the opinion of the court.

This suit was commenced in the Circuit Court for the County of Nassau, by the issuing of summons and filing a complaint under the provisions of the "Act concerning Forcible Entry and Detainer," approved August 14, 1868.

The parties appeared and proceeded to trial and a verdict was rendered in favor of the complainant, whereupon the counsel for defendant moved to set aside the verdict upon the ground (among others) that the proceedings should have been had in pursuance of the Code of Procedure, and that the act of 1868 was repealed by the substitution of the Code. The court set aside the verdict upon the ground stated, and dismissed the proceedings, and from this order and judgment the complainant appealed.

The cause having been submitted upon the record and brief on the part of the respondent, and the appellant failing to appear, the matter has been examined solely upon the points made by the respondent. If this was "an ordinary proceeding in a Court of Justice," in the language of the Code, the ground of the motion to set aside the verdict would have been good ground for dismissing the proceed-

ings *before* trial. But in our judgment this is a "special proceeding" within the meaning of the Code, and as there is no provision of the Code specially regulating proceedings of this character, the law heretofore in force regulating the subject is not repealed by the Code. This is the view of the Supreme Court and the Court of Appeals in New York in similar cases, (People vs. Hamilton, 39 N. Y., 107;Hyatt vs. Seeley, 1 Kern., 55; Minor vs. Burling, 32 Barb., 540,) and without some unequivocal language to that effect we cannot believe that the legislature intended to compel every landlord to pursue his remedy against his defaulting tenant by the slow and expensive process of an action in the ordinary form of a suit in ejectment, instead of the just and salutary remedy to be found in the special and summary proceeding regulated by the act of 1868.

The judgment and the order setting aside the verdict must be reversed and set aside, and the cause remanded for farther proceedings according to law.

DECISIONS

OF THE

Supreme Court of Florida.

APRIL TERM, 1873.

THOMAS R. SMITH, GUARDIAN OF SUSAN SMITH, RESPONDENT, VS. T. EUGENE GIBSON, APPELLANT.

An order transferring a cause to another circuit, made by a Judge who is disqualified to try the cause, must specify the county to which the cause is sent; merely ordering the transfer to another Cirouit effects nothing, and the order should show the cause for making it.

Appeal from the Circuit Court for Columbia County, Third Judicial Circuit.

The facts in this case as set forth are stated in the opinion of the court.

John W. Malone for Appellant.

E. C. Love for Respondent.

RANDALL, C. J., delivered the opinion of the court.

This is an appeal from a decree of the Circuit Court for Columbia county. The suit was commenced in chancery in the Circuit Court for Gadsden county in 1869. After answer and replication, the Circuit Judge of the Second Circuit made an order in the cause as follows:

"Upon reading and considering the foregoing petition, it is adjudged, ordered and decreed, that the above stated cause be, and the same is hereby transferred to the Third Judicial Circuit of this State. It is further ordered that the clerk of

this court be, and he is hereby required to transfer to said Third Judicial Circuit all the papers in this cause, together with a transcript of this order, upon the payment of all costs due in this case according to the statutes in such case made and provided." Signed by the Judge, August 25, 1869. All subsequent orders, including the final decree, were made by the Hon. Thomas T. Long, Judge of the Third Circuit.

In March, 1870, the counsel for the respective parties stipulated that the case be set for a hearing before Judge Long at Live Oak, in Suwannee county, on the 3d Monday in March, that being the day of the commencement of the Spring Term of the Circuit Court for that County. On the 12th of August, 1870, the Judge made his final decree, and at the same time made an order that "the clerk of the Circuit Court for Columbia county is hereby ordered to file all papers in this cause as of the 21st of March, A. D. 1870," whereupon the papers were deposited in the office of the clerk of Columbia county and filed, and the decree duly entered of record as a decree of said court for Columbia county.

From this decree the defendant appealed.

This decree cannot be sustained on account of the want of jurisdiction in the Circuit Court for the county of Columbia. The suit was commenced in Gadsden county and there has been no order made by the Judge transferring the cause to any other county. The order above recited directs that the cause be transferred to the third circuit. The statute under which the transfer was attempted, (Chap. 373 Laws of 1850,) requires that the order specify the county to which the cause is removed, and there being no county named, the transfer was not accomplished at all. The Judge of the *third* circuit ordered the papers to be filed and decree entered by the clerk of the Circuit Court for Columbia county, but he had no authority to transfer a cause pending in Gadsden county, second circuit, to his own circuit. The

order must be made by the Judge of the court in which the cause is pending.

There was, doubtless, a petition presented to the Judge of the second circuit, setting forth some grounds upon which the change of venue was desired, but the record does not show it; nor does it any where appear why the transfer was attempted to be made. Unless the cause "cannot be heard, tried or determined by reason of the disqualification of the Judge of the court to hear and determine the same," and this be made a ground for the transfer, the change cannot be ordered under the law referred to. The order is, therefore, further defective in that it does not show upon what grounds it was made. (See Swepson vs. Call, 13 Fla., 337.) The stipulation of the parties that the cause be heard before Judge Long at Live Oak, does not cure the difficulty, for it does not show any consent that the cause be transferred to Columbia county.

The record does not show that the Judge of the third circuit acted in the case by virtue of the provision in the fourth section of the law cited, for and in place of the Judge of the second circuit, because none of the causes or reasons for such action any where appear.

The Judge of one circuit cannot act in place of the Judge of another circuit except in the cases provided by law, and where the law specifies that such Judge may act in certain cases and under certain enumerated circumstances, it should appear that the conditions exist; otherwise the act lacks the essential element of vitality.

How far the stipulation for a hearing of the cause before Judge Long operated to waive any irregularity in the proceedings, or whether it is practicable by stipulation or consent to confer upon the Judge of another circuit the power to make a final decree in the place and stead of the Judge of the circuit where the cause is pending, it is not necessary here to determine.

The decree of the Circuit Court for Columbia count must be reversed and set aside, and the Judge of that cou will direct the clerk to return to the clerk of Gadsden count all the papers filed in his office relating to the case.

EDWIN M. L'ENGLE, RESPONDENT, VS. THE FLORIDA CEN TRAL RAILROAD COMPANY ET AL., APPELLANTS.

The defendant, a Railroad Company, moved to vacate an order previously made appointing a Receiver. To this the plaintiffs consented. The receiver objected. The court ordered the receiver to restore the railroad, its appurtenances and management to the company, but required him still to receive and disburse its earnings. Held to be error. The motion should have been granted so far as to restore to the owner the possession, management and control of the road, including the receipt and disbursement of its future earnings. The receiver should not have been heard in opposition to this motion.

This is an appeal from an interlocutory order of the Cir cuit Court of the Third Judicial Circuit for the county o Columbia.

The case is stated in the opinion of the court.

Peeler & Raney for Appellants.

No counsel for Respondent.

FRASER, J., delivered the opinion of the court.

This is an appeal from a part of an order made by th court below on March 27th, 1873, upon a motion of the de fendant, consented to by the plaintiff, to vacate an orde previously made appointing a receiver. No opposition wa made to the motion except by the receiver himself. Th court partly granted the motion, and partly refused it, grant

ing it so far as to require the receiver to restore the railroad, its appurtenances and management to the company, and refusing it so far as to require the receiver still to receive and disburse its earnings and incomes. In this the court erred. The motion was to vacate, and being concurred in by all parties in interest, should have been granted so far as to restore the possession, management and control of the road to the owner, and such control should manifestly include the receipt and disbursement of its future earnings.

The receiver should not have been heard in opposition to this motion. He is not a party in interest. He has no standing in court for such purpose. "He has no right to intermeddle in questions affecting the rights of the parties or the disposition of the property in his hands." 3 Md. Ch. Rep. 303. When his accounts come up for adjustment, his relations will be different. He will then be a party in interest, and may be heard, and it will be the duty of the court to see that his rights are fully protected.

It is ordered, adjudged and decreed that the order of the court below of 27th March, 1873, so far as it directs the receiver, James M. Baker, to continue to receive and disburse the future earnings and incomes of said Florida Central Railroad Company, be reversed and set aside, and the cause remanded to the court below for further proceedings not inconsistent with this order.

LOUIS J. FLEMING AND JAMES J. DANIEL VS. SUSAN A. NIX AND DUVAL SELPH.

The private examination of a married woman required by the acts of February 4, 1835, and March 6, 1845, for the conveyance of her real estate, is properly taken by the clerk.

Appeal from the Fourth Judicial Circuit, Duval County.

This action was brought by Fleming and Daniel against Susan A. Nix and Duval Selph in the Circuit Court of the Fourth Judicial Circuit for the county of Duval. The complaint sets forth that the plaintiffs were seized in fee of the west half of lot number one, in block number forty-seven, of the city of Jacksonville; that the defendants were in possession of the said premises unlawfully, and demanded judgment forthe possession as wellasdamages for thewithholding. The answer of the defendants denied the allegations of the complaint, and affirmed a seisin in fee in the defendants.

By consent of parties, these issues, by order of the court, were referred to a referee. Upon the trial before the referee, it was admitted by the plaintiffs that they claimed the premises through a deed of the defendant, Susan A. Nix, and her husband, dated the 20th of June, A. D. 1865, and saving all rights of exception and appeal, it was agreed by the parties that if in the opinion of the referee this deed was valid to pass the title of said Susan A. Nix, that the plaintiffs should recover, otherwise that the defendants should have judgment.

The referee found as matter of fact that Susan A. Nix was, at the time of the execution of this deed, a *femme covert;* that the property embraced in it was her separate estate, and that her separate examination, as to the execution of the same, was taken by the Clerk of the Circuit Court for Duval County.

He found as matter of fact, that nc other officer but a ju-

dicial officer or notary public was authorized by the law of this State to take the separate acknowledgment and examination of a married woman; that the Clerk of the Circuit Court was not such an officer, and that a deed of a married woman, unaccompanied by such acknowledgment, did not pass her title to the real estate of inheritance embraced in it.

Upon this report of the referee judgment was rendered for the defendants, and the plaintiffs appeal to this court from that judgment.

The errors assigned here raise the question whether the deed was valid to pass the title of the *femme covert*. And the question presented is whether such separate examination of the wife, under the statutes of this State, can be taken before the Clerk of the Circuit Court of the county in which the property is situated.

Fleming & Daniel for Appellants.

H. Bisbee, Jr., for Respondents.

FRASER, J., delivered the opinion of the court.

The judgment of the court below should be reversed. The private examination of a married woman, required by the acts of February 4, 1835, and March 6, 1845, for the conveyance of her real estate, is properly taken by the clerk. Those acts clearly authorize this, and we do not find any provision in these or any other act which would justify us in restricting their meaning.

Judgment reversed and case remanded, with directions to enter judgment for the plaintiffs.

LOUIS M. COXETTER, APPELLANT, VS. F. M. HUERTAS, RESPONDENT.

1. The statement in the affidavit verifying a complaint, of the facts relied upon to obtain permanent injunction, must be direct and positive, and not merely that "*some* of the statements are true," and that others are made upon information and belief.

2. Plaintiff seeks to restrain the defendant from entering judgment upon an award made by referees mutually agreed upon. The reference contained no stipulation that the award be made a rule of court, and no action was pending. The Judge, upon request, appointed the referees and directed them to make their report as soon as practicable. *Held*: That neither under the Code, nor under the act of 1828, relating to arbitration, was the court authorized to render judgment upon the award without suit or without written agreement to that effect, and as the appellant, for aught that appears, has full opportunity for making his defence at law, the process of injunction will not be granted.

Appeal from the Circuit Court for Duval county, Fourth Judicial Circuit.

A statement of the case is contained in the opinion of the court.

Summers and *Jones, Call & Basnett,* for Appellant.

F. I. Wheaton for Respondent.

RANDALL, C. J., delivered the opinion of the court.

This is an appeal from an order of the Judge of the fourth circuit refusing to grant an injunction to restrain the respondent Huertas from entering judgment upon an award of referees or arbitrators. The complaint was sworn to by an attorney of the plaintiff, and there are no other affidavits or proofs substantiating the allegations in the complaint. The verification by the attorney states that he is "familiar with some of the facts in the foregoing complaint set forth, and that they are true; others he knows on information and be-

lief, and as to those matters he believes them to be true." This affidavit is entirely insufficient to support an application for an injunction, as no distinct fact is stated upon the knowledge of the affiant.

The complaint prays that the respondent Huertas be restrained from entering judgment upon an award of referees who had been chosen by the respective parties to hear and determine certain matters submitted to them, and in which award they had found a certain amount due and owing by the appellant.

The reference was in writing signed by the parties. No suit was pending at the time the reference was submitted to, and there was no written agreement that the award be made a rule of court. It does not seem, therefore, that the court was authorized to enter judgment thereon either by the provisions of the Code or of the act of 1828, relating to arbitrations.

The appellant, therefore, if he has any defence against any proceeding to enforce the award, may show it whenever it is sought to enforce it by suit, and having this right, he cannot by anticipating legal proceedings address the equitable jurisdiction of the court to enjoin the entry of a judgment. The rule that, where a remedy exists at law, a party cannot resort to a court of equity to accomplish the same end, is too familiar to require any reference to the books. There is no pretence that the party is in danger of losing any right of legal defence in the premises.

The order of the Circuit Court must be affirmed.

CHARLES H. DUPONT, APPELLANT, VS. JAMES L. G. BAKER, RESPONDENT.

Where the return upon an appeal from a judgment rendered upon the trial of an issue of law by the court does not disclose an exception taken to the ruling of the court, either before or after judgment, the case cannot be reviewed upon appeal, according to the Code of Procedure, and the appeal will be dismissed.

Appeal from a judgment of the Circuit Court for Jackson county, First Judicial Circuit

David S. Walker and *J. F. McClellan* for Appellant.

G. S. Hawkins for respondent.

RANDALL, C. J., delivered the opinion of the court.

Upon inspection of the record in this case, it is found that it contains no exception whatever to any proceeding in the court below. There is no bill of exceptions or case and exceptions as required by the Code and the rules.

Sec. 214 of the Code of Procedure says: "For the purpose of an appeal, either party may except to a decision on a matter of law arising upon such trial, [i. e. trial by the court] within ten days after notice in writing of the judgment, in the same manner, and with the same effect as upon a trial by jury," &c.

The judgment in this case was entered upon the decision by the court of questions of law arising upon the pleadings, and no exceptions having been taken thereto, there is nothing which this court can review upon appeal. This has been the uniform ruling of the courts of New York where a similar Code exists, and the same question was discussed at length, and so decided by this court, in Bogue vs. McDonald, at January Term, 1872, in which it was also held that in such cases the proper action of this court was to dismiss the appeal.

The appeal in this case must be dismissed.

APPENDIX.

OPINIONS

OF THE

SUPREME COURT

OF THE

STATE OF FLORIDA,

RENDERED TO

HIS EXCELLENCY THE GOVERNOR,

IN THE YEARS 1872-'3.

OPINIONS

RENDERED TO HIS EXCELLENCY THE GOVERNOR

IN THE YEARS 1872-'3.

IN THE MATTER OF THE EXECUTIVE COMMUNICATION OF THE 1ST OF FEBRUARY, 1872, RELATING TO THE OFFICE OF ATTORNEY GENERAL.

1. After the neglect or refusal of a person appointed to an office to take the oath of office required by the Constitution for thirty days after personal notice of his appointment, such office is deemed vacant under the laws of this State.

2. Section 7, Article V. of the Constitution of this State, relates only to offices which are filled by election by the people.

3. Where the Governor fills a vacancy in an office requiring the confirmation or advice and consent of the Senate, the person so appointed holds the office until the end of the next ensuing session of the Senate, unless an appointment be sooner made and confirmed by the Senate. The Executive cannot make such an appointment for a shorter time.

EXECUTIVE OFFICE,
Tallahassee, Fla., Feb. 1, 1872.

To the Honorable the Justices of the Supreme Court:

According to Section 16, Article V. of the Constitution, I desire your opinion as to the interpretation of the Constitution bearing upon, and the points of law involved in the following facts:

On the 27th day of January, 1871, I appointed J. B. C. Drew Attorney General, to act as such until the first day of May, 1871, and a commission for such limited time was issued to him on the same day, a copy of which is annexed.

On the same day Mr. Drew filed in the office of the Secretary of State an oath in manuscript, (a copy of which is hereunto annexed) omitting to affirm his legal qualification to hold the office as is required by the Constitution.

On the 8th day of January, 1872, I received from the Secretary of State official notice of Mr. Drew's delinquency and of the expiration of his term of office under his appointment, and notified Mr. Drew accordingly. Afterward Mr. Drew filed a new oath bearing date the 9th of January, conforming to the constitutional requisition.

On the 19th of January, considering the office vacant, I sent to the Senate the nomination of Mr. Emmons for Attorney General, which nomination is not yet confirmed.

I now desire from the Honorable Justices of the Supreme Court an opinion in writing as to whether, in view of the facts and records cited, there is not a vacancy in said office of Attorney General.

And I further desire the explicit opinion of the justices as to the true interpretation of the provision in Section 7 of Article V. of the Constitution, which limits the scope of *ad interim* appointments to the "close of the next election."

Does such or similar provision simply affix a maximum limit to all *ad interim* appointments, or does it preclude the Executive from limiting appointments to a shorter time?

Very respectfully, your obedient servant,

HARRISON REED, *Governor.*

SUPREME COURT ROOM,
Tallahassee, Fla., February 5, 1872.

To His Excellency the Governor of the State of Florida:

SIR: Your official communication addressed to the Justices of the Supreme Court, under date of February 1, has received consideration. You ask our "opinion as to the interpretation of the Constitution bearing upon, and the points of law involved in the following facts:" That on the 27th day of January, 1871, you appointed J. B. C. Drew to be Attorney General until the first day of May, 1871, a copy of the commission being annexed to your letter. That on the same day Mr. Drew filed in the office of the Secretary of State an oath, in manuscript, not in the form prescribed by

the Constitution, the words, "and that I am entitled to hold office under this Constitution" being omitted, of which fact you were officially notified on the 8th January, 1872, and that on the 9th day of January, 1872, Mr. Drew filed an oath of office in due form.

Upon these facts you desire from the Justices of the Supreme Court an opinion in writing, whether (no appointment having been since perfected) there is not a vacancy in the office of Attorney General, and whether the provisions authorizing appointments prescribe "a maximum limit to all *ad interim* appointments, or preclude the Executive from limiting appointments to a shorter time."

In reply, I have the honor to submit the following:

1. Section 10 of Article XVI. of the Constitution prescribes a form of the oath of office required to be taken by all officers in this State. It says: "The following shall be the oath of office for each officer in the State," and then follow the words of the oath required.

No other form of oath can be the oath which "shall be the *oath of office*." It might not be vitiated by a transposition of its terms, so the entire oath in its effect was preserved, but the whole of the oath must be taken. The omission of the words which are not inserted in the oath referred to makes it an oath which may be taken by one not having the requisite qualifications to hold office, and those words were probably inserted for the purpose of preventing the filling of offices by persons not legally qualified. But it is enough that the Constitution requires the full oath to be taken.

The act of 1868, relating to vacancies in office, says: Section 1. "Every office shall be deemed vacant in the following cases: * * * By the neglect or refusal to qualify according to law within thirty days after personal notice of his election or appointment, or by his refusal to accept the office."

It appears by the memorandum filed with the oath in January, 1871, that the appointee accepted the office under

the appointment on the day of the date of the commission thus showing the "notice of his appointment" on that day

By the terms of the law, then, the office must be "deemed vacant" or not filled by reason of the neglect to qualify by taking the requisite oath within the thirty days. The taking of the oath in January, 1872, nearly a year afterwards could not restore the right to take the office which had been lost by the expiration of the thirty days. "Shall be deemed vacant" is equivalent to saying "shall be adjudged or concluded to be vacant." "By his neglect or refusal to qualify within thirty days" is put upon the same footing as "by his refusal to accept," or by the death, resignation, or removal or ceasing to be an inhabitant of the State, and other cases in which the same statute declares that an office may be vacated or refused.

Upon the facts as stated, the appointee has no title in law to the office, and the office is "deemed vacant."

It may be proper to say here that though a person may not have qualified according to law, he may be considered as to any official acts performed under color of office, an officer *de facto*, such acts being valid as to third persons. Though valid as to strangers, they are void as to the officer himself. I refer to Greenleaf vs. Low, 4 Denio, 168; Weeks vs. Ellis, 2 Barbour, 320: Green vs. Burke, 23 Wendell, 490; The People vs. Hopson, 1 Denio, 574.

2. I understand that at the time of making the appointment the Legislature was not in session, and that the office of Attorney General was vacant.

The Constitution, Article V., Section 7, gives the Governor the power to fill a vacancy in any office, when no other mode is provided by the Constitution or by law, "by granting a commission which shall expire at the *next election*."

The matter of appointment to fill vacancies in offices has also been provided for by the act of the Legislature entitled "An act relating to vacancies in office," passed August 1, 1868. Section 2 of this act provides that it shall be the duty

of the Governer to fill such vacancies by an appointment, and the person appointed shall be entitled to take and hold such office, if elective, until an election, and if it be not an elective office, until the end of the next ensuing session of the Senate, unless a successor be sooner appointed and confirmed or consented to by the Senate.

This act of the Legislature was doubtless intended to provide for filling vacancies in offices not elective as well as elective, the words of the constitutional provision seeming to refer to the temporary filling of offices which might be supplied "at the next election," and to contemplate that the Legislature might provide for all cases not expressly provided for.

If the commission was controlled by the terms of the Constitution, it would expire at the happening of an election; which, it seems to me, would be absurd in the case of an office, the title or tenure of which does not depend upon the result of a popular election. I think, therefore, that the appointment to fill a vacancy is controlled, as to its term, by the legislative act.

The appointment or commission in question, limiting the term of office to a period other than that fixed by law, is either void, *in toto*, or void only as to the limitation of the term of office; and I conclude that the commission was valid and effectual to confer the office upon the appointee; that, being so invested, his term is fixed by the law under which the authority to appoint was derived, and that the limitation named in the commission cannot control as against the written law.

Regretting the circumstances impelling you to require this communication, yet I am not at liberty to hesitate when a constitutional duty is required to be performed, and I submit the foregoing to your Excellency's consideration.

Very respectfully,

E. M. RANDALL,
Justice of Supreme Court.

SUPREME COURT ROOM,
Tallahassee, Fla., February 5, 1872.

To his Excellency HARRISON REED,
Governor of Florida:

SIR: Under the provisions of the act entitled An act relating to vacancies in office, approved August 6, 1868, the neglect or refusal of an appointee to take the oath of office required by the Constitution for thirty days after personal notice of appointment, vacates the office. If an appointee, intending to take the oath required, makes an innocent mistake in the terms of the oath taken and filed, and a commission framed in accordance with law issues thereon, I am not prepared to say that this would be a neglect or refusal to qualify within the meaning of the act.

The facts which you present in your communication in reference to the action of the appointee to the office of Attorney General are such as lead me to the conclusion that this case is not one of mistake but of intention, and that it is within the meaning of the law. As I see no reason to question the constitutionality of the act, I must, therefore, be of opinion that there is a vacancy in the office of Attorney General.

To the next question I reply that Section 7 of Article V. of the constitution does not relate to offices that are filled by the combined action of the Executive and Senate, but only to offices the incumbents of which are chosen by the people.

To the last question I reply that the second section of the act approved August 6, 1868, referred to above, provides that in cases where the Governor fills a vacancy in an office requiring the confirmation or advice and consent of the Senate, the person so appointed may hold the office until the end of the next ensuing session of the Senate, unless an appointment be sooner made and confirmed or consented to by the

Senate. I am of opinion that a proper construction of this section "precludes the Executive from limiting appointments to a shorter time."

Very respectfully,

JAMES D. WESTCOTT, JR.,
Justice Supreme Court Florida.

IN THE MATTER OF THE EXECUTIVE COMMUNICATION OF FEBRUARY 19, 1872, RELATIVE TO THE CONSTITUTIONALITY OF THE 3D SECTION OF APPROPRIATION BILL.

A law making appropriations for salaries of public officers and other current expenses of the State, cannot, under the Constitution, contain provisions upon any other subject; and a clause in such an act, prescribing the manner in which public dues may be paid, is void.

To the Honorable the Judges of the Supreme Court of the State of Florida:

In section 30 of Article IV of the Constitution of the State of Florida, it is provided as follows: "Laws making appropriations for the salaries of public officers and other current expenses of the State, shall contain provisions on no other subject;" but in the General Appropriation Bill enacted by the present session of the Legislature, section 3 reads as follows:

"*Section* 3. That all Comptroller's warrants and Treasurer's certificates, issued since the first day of January, 1872, except for services rendered prior to January 1st, 1872, shall be receivable for all State dues incurred since January 1st, 1872, excepting interest on the public debt, sinking fund, and school fund."

And I now have the honor to solicit the opinion of the

Judges of the Supreme Court upon the proper constitution to be put upon the aforesaid section 3 of the General Appropriation Bill, in the light of the above quoted prohibition of the Constitution.

In such light, is or is not section 3 of said General Appropriation Bill rendered absolutely void and of no effect?

I have the honor to be, with respect,

SAM'L T. DAY, *Acting Governor.*

SUPREME COURT ROOM,
Tallahassee, Fla., February 19, 1872

His Excellency SAMUEL T. DAY,
Lieut. and Acting Governor of Florida:

SIR: Your communication of this date is received.

The effect of the clause of the Constitution which you mention is to render everything in a law which may be called strictly "a law making appropriations" unconstitutional which proposes to do anything other than make appropriations. The third section of the "General Appropriation Bill," which you call to our attention, does not make an appropriation,and for this reason it is in our opinion unconstitutional and therefore void.

Very respectfully,

JAMES D. WESTCOTT, Jr.,
For the Court.

IN THE MATTER OF THE EXECUTIVE COMMU
FEBRUARY 29, 1872, RELATIVE TO THE C
ALITY OF THE 24TH SECTION OF THE RE

1. Art. IV, sec. 30, of the Constitution, provides that laws
priations for the salaries of public officers and other cur
of the State, *shall contain provisions on no other subject.*
of the IVth Article provides, that each law of the Le
embrace but one subject and matters properly connect
which subject shall be briefly expressed in the title.

2. Where an act which, according to its title and its general
an act to raise a revenue and regulates the assessment
of taxes, a provision therein directing the payment of th
the Public debt, and the current expenses of the State, is

EXECUTIVE C
Tallahassee, Fla., Feb.

To the Honorable Supreme Court of the State

The 24th section of the act entitled "An Ac
sessment and Collection of Revenue in the State
has become a law by the expiration of ten d
adjournment of the Legislature, is as follows:

"SEC. 24. The State Treasurer shall pay ou
which he may receive from the different Collec
nue of this State, in the following manner:

"*First*—Interest upon all seven per cent.
under an act passed January 26th, 1871, entitl
lating to the Finances of this State.

"*Second*—To pay the interest on the coup
the State bonds not hypothecated and issue
excepting therefrom bonds issued for railroad p

"*Third*—In the payment of all Comptrolle
as they are presented, issued for services rende
first day of January. A. D. 1872."

The purpose of this act is to provide the mod
of assessing and collecting the revenue of the S

I desire the opinion of the Justices of the Supreme Court upon two questions of law arising upon the facts stated:

First—Is the 24th section of this act constitutional?

Second—If it is not constitutional, does that fact render the remaining portion of the bill unconstitutional and inoperative?

Very respectfully, your ob'dt serv't.

SAM'L T. DAY,
Lt. and Acting Governor.

SUPREME COURT ROOM,
Tallahassee, Fla., March 1, 1872.

His Excellency SAMUEL T. DAY,
Acting Governor of Florida:

SIR: In behalf of the court I am directed to submit the following opinion upon the question of law submitted in your communication of the 29th of February.

Section 2 of Article XV of the Constitution requires that the Legislature shall provide for raising revenue sufficient to defray the expenses of the State for each fiscal year, and existing indebtedness of the State. Sec. 30 of the IVth Article provides that laws making appropriations for the salaries of public officers and other current expenses of the State *shall contain provisions on no other subject.* If any two subjects may be said to be cognate those embraced in these two sections would fall under that description, and yet the Constitution has expressly declared that laws making appropriations for salaries and current expenses shall contain provisions on no other subject. It would seem to follow from this that the spirit, if not the letter of the Constitution, requires the junction of law making appropriations for salaries and other current expenses with any other subject obnoxious to the charge of a violation of its provisions. But if any doubt

could exist with regard to this, that doubt is relieved by a reference to the 14th section of the IVth Article which ordains that "each law of the Legislature shall embrace but one subject and matter properly connected therewith, which subject shall be briefly expressed in the title." Here we have a general provision denouncing the union in one law of two distinct subjects, and limiting the exercise of legislative power in the enactment of a law to the subject expressed in the title. With regard to the subject of appropriations the provision is specific, thus showing beyond question the intention of the framers of the Constitution to be to confine a law making appropriations for salaries, &c., to this one subject. And they were not content to leave the matter where it was placed by the general provision above mentioned. Laws making appropriations for the purposes mentioned shall contain provisions on no other subject. This is explicit. In the enforcement or construction of such law, the court cannot regard a provision embracing any other subject, for to do this they would themselves be disregarding their duty and become parties to a violation of the Constitution. And it matters not whether the subject of appropriation be the one embraced in the title or not. In discharging their duty a court must give effect only to the subject of appropriations, if that be the one embraced in the title, or if it is not, then it cannot give it operation, for in either case its joinder with another subject would be a violation of the Constitution. It would not, however, result from this that a specific provision for the payment of expenses, necessary, proper, incidental, or growing out of a law itself, or which may be deemed needful in carrying it or its subject into execution, would not be valid, because such a provision, being matter properly connected with the subject of the law as expressed in the title, would not be prohibited by the Constitution. For instance, the provisions for the payment of the persons employed, and the expenses of all kinds incurred in the assessment and collection of the revenue, are

matters properly connected with such assessment and collection, and cannot be disconnected therefrom. But as to appropriations of a general character, such as for salaries and current expenses, the Constitution has not left their connection with another subject discretionary. It has plainly prohibited it.

With these views, we conclude that the 24th section of the act entitled "An act for the Assessment and Collection of Revenues," which seeks to pay interest upon the public debt and any other current expenses of the State, not being matter properly connected with the subject expressed in the title, is contrary to the provisions of the Constitution, and therefore void.

It does not, however, follow, that because the section referred to is void, the whole law is without effect. On the contrary, the authorities affirm that the remainder of the law is as effective as if the obnoxious section had not been attached, and our own opinion coincides with this view.

JAMES D. WESTCOTT, JR.,
Associate Justice Supreme Court.

SUPREME COURT OF FLORIDA,

APRIL TERM, 1872.

IN THE MATTER OF THE EXECUTIVE COMMUNICATION FILED THE 17TH DAY OF APRIL, A. D. 1872.

1. The Governor may require the Justices of the Supreme Court to give their opinion as to the interpretation of any portion of the Constitution, or upon any point of law. The Governor when impeached is deemed under arrest, and is disqualified from performing the duties of his office, and such duties devolve upon the Lieutenant-Governor until "acquittal by the Senate." The term acquittal signifies any affirmative *final action by the Senate*, other than a conviction, by which it dimisses or discontinues the prosecution.

2. The Governor when impeached cannot require an opinion of this Court upon such questions so long as such impeachment is pending. If, however, he makes such a demand, this Court must examine the question to the extent of determining whether there has been an acquittal, because, in the event there has been, they must deliver the opinion.

3. Whether the action of the Senate in a case of impeachment is of such character *as to entitle the defendant* to a discharge, is a question which the Senate alone can determine with effect. This Court does not administer the law of impeachments, and even if it should deem the officer *entitled* to a discharge, it could not order a discharge, and the officer is suspended until the *Senate discharges* him from the impeachment. The Senate has the sole and exclusive jurisdiction to try all impeachments, and this Court cannot wrest a case from its jurisdiction and administer what it deems to be the law of that jurisdiction.

4. When an officer has been impeached by the Assembly, the adjournment of the Senate until the next regular session, and its failure to dispose of or act upon a motion to discharge the prisoner, is not an acquittal by the Senate within the meaning of the Constitution, although the term of office may expire with the meeting of the next regular session.

WESTCOTT, J., delivered the opinion of the Court.

Sec. 16, Art. V, of the Constitution of this State provides that the "Governor may at any time require the opinion

of the Justices of the Supreme Court as to the interpretati of any portion of this constitution or upon any point of la and the Supreme Court shall render such opinion writing."

We have received the following communication from H Excellency the Governor:

To the Honorable the Chief Justice of the Supreme Cou and the Associate Justices thereof:

In view of the present and prospective difficulties arisir out of the conflicting claims between myself, as the elect Governor of the State, and Samuel T. Day, as Lieutenar Governor thereof, as to the right to exercise and perfor the duties pertaining to the office of Governor, I beg lea to submit for your consideration—

That during the session of the Legislature of the State Florida, at its regular session in 1872, I was Governor said State, and such proceedings were had by the se Legislature through the Assembly and the Senate, tha was impeached of high crimes and misdemeanors, malfe sance in office, and conduct detrimental to good mora that therefore I was suspended, under the constitution of State, from the performance of the duties of the said off of Governor; that the Senate thereafter fixed a day which it would resolve itself into a High Court of Impea ment for my trial; that the day fixed was duly notifi to the Assembly; that on the day so fixed said Senate c so resolve itself into such court; that the Assembly, by managers and counsel, appeared in due time, presen charges and specifications, to which, I,as respondent,plead and to which plea, the Assembly, by its managers a counsel, replied; and that issue being joined, the manage by their counsel, applied to the court for continuance of trial of said charges for cause shown; that I by my couns declared myself ready for and demanded a trial,and protes against such continuance.

Thereupon, by a vote of said court, it refused so to continue said trial to a future day; that thereafter, pending discussion as to what action the court would take in relation to the said trial, motion was made by a member of said court that said court adjourn, which motion was carried, and the Chief Justice of the Supreme Court, who was then and there presiding over said court, declared said court adjourned; that in virtue of said action, believing that any disability to perform the duties of Governor as aforesaid was fully removed, I have issued my proclamation, under the great seal of the State, have assumed the duties of said office, and performed acts, and been recognized by some of the officers of my Cabinet as such Governor;

That I caused to be forwarded to said Day a proposition to submit the whole question to your honors, that without hindrance or delay it might be judicially known to the good people of the State who could or should of right perform the duties of said office; but that said Day declined to appeal to the courts, and declared that he would maintain his place as Acting-Governor of said State by force;

That such refusal and threat endangers the peace and dignity of the State, and delays the proper and due administration of the State government.

These facts submitted, I beg you will advise me in the premises, that the people may act in accordance therewith, in this:

Did the action of the said High Court of Impeachment remove the disabilities growing out of suspension from power to perform the said duties, and restore and reinstate me in the powers and duties properly pertaining to said office, particularly in view of said proclamation and assumption thereof?

I have the honor, etc.,

HARRISON REED,
Governor of Florida.

The question presented for our consideration is whether his Excellency Harrison Reed, Governor of Florida, is at this time in contemplation of law "deemed under arrest" and "disqualified from performing any of the duties of his office." We are obliged to determine this question in order to ascertain whether he has a right to demand our opinion as well as whether it is our duty to give it.

The Constitution (Art. IX, Sec. 16,) declares that an officer when impeached by the Assembly shall be in that condition, but any officer so impeached may demand his trial by the Senate within one year from the date of his impeachment. His Excellency Harrison Reed, Governor of Florida, was impeached at the late session of the Legislature, (January, 1872.) This is admitted by the communication now before us, and it is shown by the journals of the House of Assembly and the Senate for that session. The consequence of that impeachment was to disqualify him from performing the duties of his office. The suspension consequent upon the impeachment can cease to exist under the constitution, if it ceases at all, but in one way—which is acquittal by the Senate—for whatever may be the effect of the expiration of one year from the impeachment and demand for trial, that time has not elapsed, and for that reason the construction of that clause of the constitution is not here involved. In the language of the constitution, the officer "shall be disqualified from performing any of the duties of his office *until acquittal by the Senate.*" The only event then which could have operated in this case to restore this officer to his powers, must have been *an acquittal by the Senate.* The simple question then presented for our consideration is, has there been *an acquittal by the Senate?*

What is the true intent and meaning of the word acquittal as here used in the constitution? The court does not differ as to the proper definition of this term. It is our unanimous opinion that it is not restricted to an actual judgment of acquittal after vote, upon full evidence fail-

to convict, by a requisite two-thirds of the members of an organized Senate. We think its true signification embraces any affirmative final action by a legal Senate other than a conviction, by which it dismisses or discontinues the prosecution. Any final disposition of the impeachment matter by the Senate, the Chief Justice presiding, other than a conviction, is therefore an acquittal *for the purpose of removing the disqualification from performing the duties of the office.* Whether it is effective for any other purpose, is not here involved.

The only question, therefore, which remains to be considered to dispose of this very elaborately argued subject is, *has the Senate made any such final disposition of this impeachment?* This is a very plain, simple question, to be determined by an examination of the journal of the proceedings of the court and the Senate on the last day of the session of the Court of Impeachment.

It appears from the record of the proceedings of the court on that day, that the counsel for the respondent moved that the plea in the case before that time filed be held and treated as the answer to the articles of impeachment filed subsequent thereto. This was adopted. Then followed the replication to the plea. A resolution was then offered that the court adjourn in accordance with a concurrent resolution of the Assembly and Senate for their adjournment on that day. This was not adopted. The respondent then filed a protest against further delay, and especially against delay or continuance until an impossible day or time within which the office of Governor shall have expired. After which he moved that the court require the managers to proceed with the evidence, or that he be acquitted and discharged. This motion the record does not disclose was acted upon. An order was then offered by a Senator that the court adjourn. The record states that this order was adopted, but this could not have been the case as there were further proceedings. Then followed an offer of an order by a Sen-

ator as a substitute, (for the previous motion to adjourn, we suppose,) that the court sit from day to day, at 10 o'clock of each day, for the trial of the respondent. It does not clearly appear whether this was adopted, but we deem it immaterial whether it was or not in the view we take of the subject. Then follows a motion to adjourn, and an adjournment in general words specifying no time. On the same day, at 12 M., the Senate, on motion, adjourned *sine die,* or in other words adjourned for the session and until the period fixed by the constitution for the next session of the Senate.

It appears, therefore, that the court, after failing to act upon a motion to acquit and discharge the prisoner, simply adjourned, and that the Senate at 12 M. of the same day adjourned for the session. In view of this record, it is plain, therefore, that the court made no final disposition of the case, but simply adjourned. The case is, therefore, still pending in that court. A case is pending if it is not finally disposed of, and clearly here is no final disposition of it by any order of the Senate so doing. On the contrary, the record shows that a motion to discharge was pending at the time of adjournment.

But it is insisted that this action by the Senate entitled the respondent to his discharge, and that in contemplation of law it was equivalent to his discharge. Now, if the Senate is the sole authority to discharge—if it is the only tribunal that can discharge—then it is plain that it is the only authority that can act in the matter. *Whether a prisoner is discharged from the custody of a court or from an indictment, is a fact to be determined by a simple inspection of the record. If there is no order to that effect, then there is no discharge, and if, as in this case, there is nothing in the record discharging the respondent, the simple result is that the Senate has not discharged him.*

It is proper to inquire here whether we have any legal right or power to determine what the effect of this action is under the circumstances. If we have not; if it shall

as we conceive it is, the exclusive and sole pr
Senate to determine that question; if by so de
a jurisdiction not vested in this court by the
tution and wrest a case now pending from a c
sive jurisdiction over the trial of the subject,
to review its action and discharge what we
to be its duty, it is plain that such action is ir

Let us compare the powers and functions
in this matter with the power of this court.
Senate when organized for the purpose of try
ments? What is the extent of its jurisdicti
relation exists between this tribunal and that?
when thus organized, is unquestionably a cou
is a body invested with judicial functions; bec
mines issues both of law and fact; because it
law in the form of judgment, and through th
tality adjudges the penalties named by the
Not only is it a court, but it is a court of excl
and final jurisdiction. Its judgments can be
ject of reversal or review in no other court
Constitution and the laws. This simple exerc
functions, the application of law to facts an
its conclusions, are not extraordinary or trans
ers. Nor is the simple fact that its jurisdi
original and final a circumstance which alone
us in ascribing to it any extraordinary degree
because the general reason why a court has
and final jurisdiction is the small degree of i
the matter involved. Not only is this tribuna
it is a court of great importance. Its juris
indeed very extensive as to the number of the
ter which may come under its control, but
which it acts, while limited to but one class of
high and transcendent. This is so because o
matter of its jurisdiction, the degree and
punishment it imposes, and the exclusive po

has of regulating its practice arising upon any matter pending before it. All other persons in whom judicial power is vested under the Constitution derive their existence from a delegated power to the Governor or Governor and Senate. These persons represent the people directly through the exercise of the elective franchise. Not only are they thus clothed with judicial powers, but they constitute one branch of the Legislature, and are a part of the law-making power. While thus it is a court, it is none the less the Senate, for the Constitution declares that *"all impeachments shall be tried by the Senate."* One class of politicians have contended that it is a Senate and not a court; another class that it is exclusively a court. It is in fact both. This, the Supreme Court of the State, exercises its highest and most transcendent jurisdiction through the instrumentality of the perogative writs of mandamus, prohibition and *quo warranto.* Through them we control inferior courts and officers, superintend corporations and protect the offices of the people from usurpation. We may oust an usurper because he was not elected or eligible, and there our power ends. This Court of Impeachment and the Assembly go further. To them the people have confided the superintendence and control of all persons who are invested with distinguished political franchises and offices. This court can say to an officer, you are not elected or qualified. That court can say to him, we admit that you are selected by the people; that you were in all respects qualified, and notwithstanding all this, you shall not only no longer discharge the functions and franchises of a particular office, but you shall not hold in the future any office of honor, trust or profit under the State. Under these circumstances, we submit that we should and must be very careful how we act in such matters. This jurisdiction is too high and transcendent to be invaded.

In the argument of this case, allusions were made to the rule that the different departments of the government must keep within their several constitutional spheres of action

The conflict here threatened is not between co-ordinate departments of the government. It is between two courts of high and transcendent jurisdiction. We having no jurisdiction of the subject-matter of impeachment, propose to discharge an impeachment proceeding because we conceive that the legal effect of certain action taken in the court having exclusive jurisdiction of the subject is to entitle the party to a discharge. Suppose we test the question of jurisdiction by bringing the matter to a contest. Suppose we say in this instance to Gov. Reed that the legal effect of this action is your discharge and you are entitled to enter upon the duties of your office. Suppose the Senate meets tomorrow and determine for themselves that they have not in fact discharged the prosecution and they have done nothing which in law entitles him to a discharge; that upon their calendar the case is still pending and they propose to proceed to the trial. Is it not perfectly clear that if the Senate has the exclusive jurisdiction of the case, its judgment and not ours must prevail? We think there can possibly be no doubt here.

But it is not insisted that the court in which these proceedings transpired has gone out of existence and there is no court that can try the case. The effect of its action was likened in argument to the effect of a dissolution of Parliament, and it was urged that new members were to be elected to the Senate for its next session; that some of the Senators already sworn on the Court would cease to be members of the Senate, and other persons would be elected to fill their places.

We enquire, then, did the court cease to exist with the late session of the Legislature? It is insisted that it did cease to exist because of the adjournment and the necessity for electing new Senators before the next session. To this proposition no member of the court accedes. So long as there is a Senate there is a court. If the Senate was abol-

ished and the impeachment causes then pending before
not transferred to some other tribunal as its successor
trial, then we would have a different question for soluti
But that is not the case. Because Senators may die
change, the Senate does not cease to exist nor do its fu
tions as a court cease. The court co-exists with the Sen
Because the Judge of a Circuit Court may die, the Cir
Court does not cease to exist as a tribunal known to
constitution. A court is one thing, and the judge of
court is another. The abolition of the court does
follow from a vacancy in the office of the judicial offi
that presides in it; the death of each officer compos
this court, between the regular terms appointed for its
ting, would not a work a discontinuance of any cause
upon its calendar. If such a thing should occur in te
it would intercept and interrupt the actual business
other officers are appointed under the constitution;
would be the whole result. So far, therefore, as the tribu
is concerned, the Senate, like any other judicial tribu
does not die or cease to exist with the adjournment of
session or term. Its business as a court is simply interc
ed. All cases of impeachment pending and undisposed
at the preceding session remain upon its calendar or do
until *the Senate sitting as a court* enters an order fin
disposing of each case. Much embarrassment in the
sideration of this subject will arise if we make the Se
occupy to this matter the relation of a party, and conc
the idea that if the personal character of the Se
changes, the suit thereby is abated. We see really
necessity for going in search of any precedent to sus
so simple a proposition as this.

The argument, however, was pressed with such f
that we must give it some consideration.

We need not go to impeachment cases pending in
House of Lords from year to year, from prorogation to
rogation, and from dissolution to dissolution of parliam

to establish this view. There are but two impeachment cases in the State of Florida. One of these presents a precedent to establish the proposition that an adjournment for a session and a change in the individual Senators composing the Senate did not destroy the court. In the matter of the impeachment of James T. Magbee, Judge of the Sixth Judicial Circuit of the State of Florida, the impeachment went over from one session to another. At the succeeding session, new members of the court were sworn, and this court thus organized acted upon the case. The court, therefore, still exists. The case is still pending. The Governor, as a necessary consequence, is suspended. But it is said that the proceedings had at the last session of the Senate *entitle him to a discharge*. We are not the court to determine that question in any form of proceeding. If we believe that he was entitled to a discharge, according to the practice in impeachment causes, our declaration to that effect could amount to nothing. That which enables him to resume the discharge of the functions of his office is his *discharge by the Senate, not his discharge by this court;* and any attempt on our part so to do, under the circumstances, would be a pure usurpation of authority. Chief Justice Marshall has well said that to usurp such authority is nothing less than treason to the Constitution.

We cannot determine the effect of this action of the Senate, and all that we have to do with the subject is to respect its judgment, whatever it may be, provided the punishment inflicted is not in excess of that named in the Constitution, and is authorized by it, and is the judgment of a legal Senate vested with jurisdiction of the subject-matter and of the person.

It appears to us to be a self-evident proposition that a case may still be pending in a court, a prisoner be still under arrest and in the custody of the officer, and yet the party be entitled to a discharge according to the principles of law applicable to the action of the court in his case. Take the case

of a prisoner entitled to his discharge because the jury has been discharged, for no good cause, without his consent. It certainly must be very plain to the most ordinary comprehension that he *is neither discharged nor acquitted in fact* until the court in which the case is pending so declares by its order. That is to say, a party may be entitled to a discharge and yet not discharged in fact. Now, what is it which, by the Constitution, suspends the officer? His impeachment. What is it that restores him to his functions? His acquittal. His acquittal by what power, by what tribunal? By this court? No. By what court, then? The Constitution is very plain on the subject. It says, *his acquittal by the Senate*—by the court which now has the case before it. Our only jurisdiction is to follow and enforce the Senate's final action and judgment, if constitutional. We would disregard it if it was otherwise; that is to say, in the absence of a decision of that question by the Senate, this court, even though it is satisfied what should be the *decision of the Senate* upon that question, and what the law applicable to it is, has no authority to determine the law with legal effect, and hence whatever may be our opinion as to what should be the rule, it is for that jurisdiction, not this, to declare it.

Our power in the matter of this impeachment is limited and circumscribed by the fact that it is a matter beyond our jurisdiction entirely. After an impeachment perfected according to the Constitution, the whole matter is with the Senate, and it has the exclusive right of determining all questions which may arise in the case. If its action is unconstitutional, we have the right and power to declare its nullity, and, in a proper case before us, to enforce the right of any party of which it proposed to deprive him.

A short review of the cases illustrating the comity of courts and showing the limitations upon the power of other courts, following from the fact that the jurisdiction of one court is being exercised over the subject-matter, will show

the course generally pursued where there is even concurrent jurisdiction over the same subject-matter. They will also show the effect to be given to the record of this Court of Impeachment if it was presented collaterally as evidence in a *quo warranto* or other proceeding. As a matter of course, it could only become the subject of examination in this court by way of evidence in a collateral manner, as we have no appellate jurisdiction as to this Court of Impeachment, nor indeed have we concurrent jurisdiction over the subject of its power.

Chief Justice Marshall, in the case of Smith vs. McIvor, 9 Wheat., 532, says, in cases of concurrent jurisdiction, the court which first has possession of the subject-matter must determine it conclusively. We think, says he, that the cause must be decided by the tribunal which first obtains possession of it, and that each court must respect the judgment or decree of the other. In the case of Brooks vs. Delaplane, 1 Mar. Chy. Dec. 351, the chancellor says: "There is no instance in which either one of the English courts has attempted to hinder or stay any part of the proceedings in a suit which had been rightly instituted and was then progressing in another. This court has no more power to stay the proceedings of the county courts as courts of equity than have the latter courts to prohibit the proceedings in this, and if this court should now entertain jurisdiction of the subject-matter of the present controversy and proceed to decree the relief sought by the bill, there may and probably will be two decrees inconsistent with each other, each affecting the same persons. The only course of safety, therefore, is, when one court having jurisdiction over the subject has possession of the case, for all others with merely co-ordinate powers to abstain from any interference."

It is the natural consequence of an adverse decision in one court, during the progress of a trial, that a party should desire to have his case adjudicated in another, and hence parties very often improperly attempt to get the intervening

aid of another court when they are not entitled to it. We have at least one case in the Supreme Court of this State announcing the rule referred to, and there are probably but few Supreme Courts of the States which have not decided the question in the same way. If we leave cases which are civil in their character and look to the action of one court in reference to another, where the subject-matter to be affected is the personal liberty of the citizen, we will find that courts limit their action in reference even to this matter by the observance of like principles of comity, and by enforcing what they conceive to be such limitations upon their powers as are necessary to prevent conflicting adjudications upon the same subject-matter. Take the identical case which in argument the counsel presents as analagous in some respects to the proceeding of the Senate in this case—the discharge of a jury from rendering a verdict in a case of felony without the consent of the prisoner and for no sufficient cause in law. It is contended that this action is equivalent in law under certain circumstances to an acquittal, and the prisoner is entitled to his discharge without day from the indictment. Admit the correctness of this view for the sake of the illustration. Suppose the court adjourns for the term, leaving the person in the custody of the officer, without making any order in reference to the case, and the person is brought upon *habeas corpus* before a tribunal authorized to issue that writ, would the court discharge him? In 5 Ind. 290, the jury had been improperly discharged before verdict, so that the defendant could not be subjected to another trial, yet the court refused to discharge him on *habeas corpus* and said he must apply to the court in which the indictment was pending for relief.

There are quite a number of cases illustrating the same principle. In *ex parte* Walton, 2 Whart. 501, the statute authorized a discharge when the prisoner had not been tried at a second term. In such a case, upon *habeas corpus*, the court held that the power of discharging was confined to

the court in which he was indicted, and that although it was bound to allow the writ, yet that in such a case it would not look further than the commitment, if it was unexceptionable in the frame of it. This ruling was approved in the subsequent case of The Commonwealth vs. The Sheriff, 7 Watts & Serg. 108.

It is unnecessary to insert in this opinion extended quotations from the cases upon this subject. The principles of the following cases are similar to those just commented upon: 2 Green, 312; 4 McCord, 233; 1 Watts, 66; 8 Serg. & Rawl., 71; 6 McLean, 355; 2 Paine, C. R., 348; 10 Mass. 101; 3 Wis. 1 to 218. There are a few cases which do not fully sustain the doctrine above enunciated, but it deserves to be noticed, says a commentator who has given great attention to the subject, that in all these instances the power to interfere was exercised or asserted by a court not only superior to the court or officer under whose process the imprisonment was claimed, but having by its Constitution an appellate jurisdiction over such court or officer. Hurd on Hab. Corp., 351.

Before leaving the discussion of the cases upon the subject of *habeas corpus*, it may not be inappropriate to illustrate our view by an application of the principle to a hypothetical case. Suppose the Constitution provided for Governor Reed's actual instead of his constructive arrest. The record of the Court of Impeachment, as it is now presented, is filed with his petition praying a *habeas corpus* as an exhibit thereto, and the writ is awarded. Now, the customary rule in *habeas corpus* is to require notice of the application for or pendency of the writ in criminal cases to be served upon the public prosecutor where the imprisonment is under criminal process. This would be in this case the managers and counsel appointed by the House of Assembly. They would be entitled to be heard upon the matter before we pronounced judgment, for they prosecute in the name of the whole people. Under these circumstances, we submit that it would

be extremely strange and novel for the managers to appear before this court and ask of us, in the name of the people, not to discharge their impeachment which was then pending in the Senate, and to permit the Senate to determine for itself, in a case then pending before it and of which it had exclusive jurisdiction, whether something had been done in the progress of the trial up to that time which entitled the prisoner to an order discharging him, according to the law governing that forum in the matter of its exclusive jurisdiction upon the subject of impeachments.

These are cases in the ordinary common law courts, civil and criminal, illustrating the principle of comity between courts and the limitations upon the power of one tribunal, following from the fact that one court having taken jurisdiction of the subject matter, it has not finally disposed of it. They are referred to not as cases precisely analagous in all respects to the matter now under consideration, but only as illustrating the general subject. The matter here presented is one in which the jurisdiction is exclusive, not concurrent.

In what we have said we do not affirm the entire want of jurisdiction or power in this court in *proper cases* to investigate and inquire into any act of the Senate affecting the rights of parties before it in a case where what they have done comes before us collaterally. That power cannot be thrown off. But when the Constitution vests exclusive jurisdiction over impeachments in the Senate, we are deprived of the power of deciding questions arising in the course of the trial, or whilst the impeachment is pending, for that necessarily must belong to the court vested with the principal power or jurisdiction, and there is no appellate power in this court to reverse it. When, therefore, in exercising the power and jurisdiction vested in this court, we proceed to inquire into matters brought properly to our attention, the law does not authorize us to substitute our judgment for that of the Senate upon questions before that tribunal,

hence, if it appears that no order finally disposing of the case has been made by it, we are at once arrested by the rule of constitutional law which affirms that the Senate itself is the only tribunal to decide whether, from the nature of its own previous action, the party is entitled to a discharge.

We do not contend that the action of the Senate cannot be final without its express declaration to that effect. We determine for ourselves whether that action was final. We examine the record of the Court of Impeachment to ascertain what it has done. Our jurisdiction and power to go this far is clear, because this record is here presented to us collaterally for examination, and we can thus examine as evidence the record of any judicial tribunal. 3 How., 763. After examination of this record of the impeachment, we find the case still pending. Being in this condition, we say it is for the Senate to make some final disposition of it. We do not decline to interpret the action of the Senate or to construe it. This we must do, in order to ascertain whether it is our duty to answer the demands of the Governor. Having ascertained that there is no such right in the Governor, he being now suspended, we decline to say anything to him upon the subject except that he is suspended, and to define his relations as Governor to the Lieutenant Governor. If the question here asked by the Governor had been asked by the Lieutenant Governor, in whom the right to have our opinion is now vested, it would have been our duty to have stated whether Governor Reed was entitled to a discharge. We would in this event have stated what the rule was, if there were any precedents establishing a rule, or in case there were no precedents, we would have stated what the rule ought to be. But we must have declared even then that our opinion could not have the effect of restoring Governor Reed, and it would still leave the question open for determination by the Senate. To illustrate our view. His Excellency, Harrison Reed, on the 28th of January, 1869, inquired of

this court whether the election of Abijah Gilbert as United States Senator by the Legislature of this State was illegal and void. In reply the court said: "It appears to us that such election was irregular, but it is out of our power *to decide* that the election was illegal and void, that question being exclusively for the Senate of the United States. If the Senate determine that the election was valid, that is final, but until it is determined, its validity will remain an open question." 13 Fla., 688, 689. So in this matter, if Lieut. Gov. Day had required us to say whether Governor Reed was entitled to a discharge, we must necessarily have accompanied any statement we may have made with a protestation that the only power authorized to interpret the law with legal effect and give judgment was the Senate, and that until it did so act, the matter must remain an open question. In 4 Cranch, 241, Chief Justice Marshall said: "Upon principle it would seem that the operation of every judgment must depend on the power of the court to render that judgment, or in other words on its jurisdiction over the subject-matter which it has determined." In 1 Peters, 340, it was held by the Supreme Court of the United States, "that where a court has jurisdiction, it has a right to decide every question which occurs in the cause, and whether its decision be correct or otherwise, its judgment, until reversed, is regarded as binding in every other court. But if it acts without authority, its judgments and orders are regarded as nullities. They are not voidable but simply void." The Senate having exclusive jurisdiction over the subject of impeachment, to the extent that it must alone determine and decide whether the Governor is entitled to a discharge, a solemn judgment entered by this court discharging him would be absolutely void. There is no form of proceeding known to this court by which it can enter a judgment discharging Gov. Reed from a pending impeachment. Certainly, in a matter of this kind, where we render a simple advisory opinion, we could not restore him, even though we thought he was en-

titled to a discharge. We have no jurisdiction of the subject-matter, there is no case before us, and we never enter a judgment as a consequence of an advisory opinion in any case.

With these views, we can only say that until Gov. Reed is acquitted by the Senate, we cannot acquit him, and that during his suspension his power as Governor to demand our opinion upon any question of law ceases. We decline to say whether the law applicable to the proceedings of the Senate at its last session entitles him to a discharge. It would be improper in this court to go beyond saying that the Court of Impeachment is still in existence and must determine the matter. We should not suggest to that court how it should determine a question to come before it in a case now pending. With the circumstances reversed, we should not be very much obliged to that or any other tribunal should it suggest to us how we should determine a case pending before this court; and should it, unasked by us, give its views of the law of a case pending before this court, we should deem it a grave mistake as well as an improper interference. Being suspended, Gov. Reed's relation to us in this matter is no more than that of a citizen, and it would certainly be improper in us to give a voluntary opinion to a citizen upon a question of law, whether it was involved in a case pending in a court or not, and whether we had jurisdiction over the subject-matter or not.

The court directed that the foregoing opinion, covering the subject-matter of the communication, be filed; that a copy of the same, together with the following letter in reply to the communication of the Governor, be sent to his Excellency the Governor, and that a copy of the opinion be forwarded to the Lieutenant Governor:

SUPREME COURT OF FLORIDA,
Tallahassee, April 29, 1872.

His Excellency HARRISON REED,
Governor of Florida, Tallahassee, Fla.:

SIR: In reply to your communication of the 17th day of this month, we have the honor to state our conclusions as follows:

Your impeachment is still pending before the Senate, which is the only tribunal authorized to acquit you under the Constitution, and until you are acquitted or discharged by that tribunal, within the meaning of the Constitution, you are suspended.

It may be true that the action of the Assembly and Senate in the matter of your impeachment at the late session of the Legislature would entitle you to have the said impeachment proceedings dismissed, and that *the Senate should discharge and acquit* you therefrom, but that is a question which can be legally determined by the Senate alone, that being the tribunal before which the matter is pending and the court which has over the entire subject-matter both exclusive original and final jurisdiction. Were you not suspended, we are inclined to think that it would be our duty in ordinary questions, notwithstanding the want of jurisdiction in this court over the subject-matter involved in any question you might ask, to indicate simply in an advisory manner what was the law of such a case. This, however, would not determine the question, and would have no legal effect. A case of this kind will be found in 12 Fla. Rep., 686, and to the action of the court there we refer as illustrating our view under such circumstances. Even if the case were one which might be adjudicated in this court, our opinion in this way is only advisory and would not directly affect individual rights or the legality of acts, and would not restore you to an office held and exercised by another. If it was the office you sought to recover, you would have to resort to the proper proceeding to oust the party.

Lieutenant Governor Day, however, is neither *de jure* nor *de facto* Governor. He is no longer Governor. He is Lieutenant Governor, exercising the functions of the office of Governor. You are still *de jure* Governor. In case of a contest between you and the Lieutenant Governor as to the right to exercise executive functions, if we were of the opinion that the law gave to his acts the same standing as acts of *de facto* officers, it would perhaps result that you being suspended and not restored could not require our opinion, that power of office like all others being suspended. In such a case, we are inclined to think that you would not be entitled to demand our opinion while there was an adverse party exercising the functions of the office of Governor, unless his acts in office and title to office were void.

In the present state of the impeachment proceedings against you, your power to demand our opinion is suspended. To give an opinion, under all the circumstances, we think, could be properly viewed by the Senate as unsolicited advice by this court upon a question which the Senate can alone determine.

A purely voluntary expression of an opinion by this court upon a subject of the greatest importance then pending before the Senate, might be calculated to embarrass its action and might perhaps be viewed as an impertinent suggestion as to its duty in the premises. Whether you are entitled to a discharge that court must determine.

With the earnest hope that the Senate may bring these proceedings to a speedy and just termination, we have the honor to be, with much respect,

Your Excellency's ob'dt serv'ts,

O. B. HART,

JAS. D. WESTCOTT, JR.,

Justices of the Supreme Court of Florida.

RANDALL, C. J., delivered the following dissenting inion:

The communication of Governor Reed states a case purrting to be the case made by the record of proceedings the Senate organized for the trial of his impeachment. The case as found in the journal of the Senate does not ffer essentially in any legal aspect from that stated by n.

The question presented is, what is the effect of the action ken by the Senate and Assembly upon the impeachment the Honorable the Assembly, which was lately pending fore the Senate, upon the personal and political rights of vernor Reed, and the political rights of the Legislature d the people?

The office and purpose of the process of impeachment, as s well stated by one of the counsel who appeared in beIf of the Lieutenant-Governor, is to provide that the State y not be degraded by a delinquent officer; and as well, was stated by other counsel, that in this process neither State nor any citizen should be deprived of any lawful ht by the action of any branch of the government.

It was well urged that this court had no authority to sit review of or to reverse or nullify the action or proceedgs of the Senate. But it was not well said, in a legal sense, t the Senate was a body having a superior jurisdiction, ause its powers comprehended a broader and more elevad plane, untrammeled by the severe rules and axioms of common or statute law. If this be true, the modern ories of government and the forms of civil governments med in the later periods, are but solemn complicated nds, machines for the amusement and the impoverishment the people. If all political and judicial supervisory power lodged in one body of men, notwithstanding the esshments which all peoples have so reverently organized er written Constitutions, which in terms divide the

powers of government into several departments of magistracy, supposed to be created to perform the offices of adjustments and balances, then are such several departments mere cheats and shams, baubles and play-things invented to delude and ensnare.

If this be so, what need of any other department than a single body of men, or indeed a single human being, covered with tinsel, whose "ambrosial locks" and imperious nod may dispense all power and all justice, and command the obedience of all other men; a government fashioned after that of heaven itself, but whose Mentor is a mere piece of crumbling pottery?

On the other hand, the Senate, created by the written law of the people, like any other department or fraction, has such authority as is conferred by the law. It has not been supposed to be a tribunal higher than the executive or judicial branches of government. As a judicial body, it can act only upon the request of another branch called the Assembly. It has judicial jurisdiction of but a single proceeding. It cannot reverse or set aside the judgment of the Supreme Court or of a Justice of the Peace. It may, if the Assembly complain and prove, dismiss our members for violation of law, but it cannot prescribe our judgments. Neither department is utterly independent of or "above" the other. The Legislature, by the repeal of a law, may take from the courts the power to act in a given case depending upon the existence of the repealed act, but it cannot deprive the courts of the power to administer the existing law. It may pass an unconstitutional act, and no power can prevent its action, but it cannot enforce it, nor will the courts permit its enforcement; nor can the Legislature enforce any law without the aid of the judicial tribunals—neither is superior, neither is inferior.

The remarks addressed to the court by counsel concerning the higher or supervisory character of the branches of the Legislature, as judicial tribunals of which the courts may

stand in peculiar awe, cannot be considered otherwise than as an argument that the proceedings of the Senate in such capacity were beyond the *control* of any other tribunal. This is not a question in the consideration of the matter now under examination.

The simple question is, what is the necessary legal effect and result of the action of the Senate and Assembly upon the impeachment and trial of the Governor? I may further remark that the proceedings of the Senate in this matter are, unquestionably, beyond the control of this court, even as the proceedings of the court are beyond the control of the Senate. The respect which each body owes to itself precludes the possibility of any interference by it with the action of the other, or any invasion by either with the jurisdiction of the other. The final action of the Senate is to be examined only for the purpose of ascertaining what action it has taken and what results legally flow from such action, to the end that such results may be declared. And I venture to declare that this final action must he examined with reference to the law governing the powers of the actor, for, so far as the rights of others are concerned, even a legislative or judicial body cannot violate the law so as to deprive the people or any one of them of rights intended to be secured by law, without abrogating the principle underlying the whole fabric of republican institutions, that governments are instituted among men for the protection of men's rights; and the courts are organized as integral parts of the government for the purpose of enforcing this protection.

The house of Assembly impeached the Governor, and virtue of the Constitution he stood bereft at once of Executive function, which at once devolved upon the Lieutenant-Governor. The Governor yielded, and pleaded the charges.

The Senate by its first rule, its law adopted for the poses of the trial, resolved to continue in "session from

to day, Sundays excepted, until final judgment shall be rendered."

The Assembly declared itself not ready to prove the charges, by reason of the absence of testimony and witnesses.

The Senate, by a vote of eleven in the negative to nine in the affirmative, rejected an order proposed by one of its members "that the Senate, sitting as a High Court of Impeachment, do now adjourn in accordance with the concurrent resolution adopted by the Senate and Assembly for the adjournment of the Legislature."

The Senate thus refused to postpone the trial as requested by the Assembly, and thus practically repeated the rule to proceed from day to day until final judgment.

The Governor demanded a trial, and protested that the trial should not be postponed to a time beyond the expiration of his term of office, and insisted that such postponement not only would deprive him of his right to a trial and his right to be heard in his defence, which was secured to him by the terms of the Constitution, but would deprive the Senate of the power to try him, as he would be out of office by the constitutional limitation of his term before the next meeting of the Legislature, and the power of the Senate, therefore, to give judgment would be gone; such postponement would leave nothing upon wihch a judgment could operate. Whereupon the Assembly not proceeding with the trial, the Senate sitting for the trial adjourned, and the Senate and Assembly forthwith adjourned without day.

Now the sole question is, what is the legal result and the legal effect upon the rights of all the parties affected? I cannot avoid the question by declining to answer upon the ground that the court cannot determine the regularity or review the action of the Senate in its judicial capacity. I would not decline such interference whenever it should be demanded from any source. Has the Senate taken such action that as to itself, and to Gov. Reed, and to the proceed-

ing, it must necessarily take any further action in the ca
to bring it to a termination? Is its power over the case e
hausted? If I understand the majority of the court, th
decline to interpret this action of the Senate; and then,
think, they do proceed to construe it, differing with me
to our duty to declare our opinion of its legal effect.

They conclude that the proceedings had by the Sen at
were not final until so declared by that body, while my c on
clusions are that the action taken was final as to result a n
effect; and if the Senate consider the matter again it sh ul
come to the same conclusion, uninfluenced, however, by ou
opinions in the matter of its duty, of which it alone vill
judge.

I have had neither time nor inclination, nor is it mat rial
in my judgment, to comment upon the various authori ies,
legal and historical, relating to impeachment proceedi gs,
upon the legal effect of the prorogation or dissolution o the
British Parliament, for, according to the view I take o the
case, I may agree consistently with the argument of the
learned counsel who responded to the counsel of Gov. R eed.
I deal only with the case presented and its peculiar cir um-
stances.

I conceive that the analogy between the qualities an or-
ganization and powers of the House of Lords, and thos e of
the Senate of this State, is utterly wanting in at least two
important particulars. The points of departure may be dis-
covered in the following statement:

1. The Senate in conjunction with the Assembly may ad-
journ and thus dissolve their session, and may thus ceas e to
act and deprive themselves of the power to act in a legi sla-
tive or judicial capacity, *of their own volition.*

The House of Lords is a court in its fundamental e is-
tence, having all the incidents and jurisdiction of a judi ial
tribunal at the common law; having power to try not o ly
political but other offences, and to review the judgments a nd
proceedings of all other courts; its judicial existence can ot

be divested or destroyed by its own action; it cannot dispose of cases before it by its dissolution or adjournment; it cannot dissolve itself; like all common-law courts, its cases remain before it until it takes affirmative action; it cannot terminate its own sessions by adjournment, but only by the command of the sovereign, and the sovereign cannot dismiss causes from its jurisdiction. Hence the prorogation or dissolution of the Parliament, being done in virtue of the royal command, a power not to be resisted in that respect, does not divest it of jurisdiction over pending causes, and an impeachment, being a proceeding against *the person,* survives every accident save the death of the accused. (I understand this to be the law of England, and I think that the death of the accused destroys from that moment all jurisdiction of the House of Lords or other criminal courts over the proceeding, and that such proceedings as were pending are from that moment abated.)

2. The impeachment before the House of Lords is a proceeding against the citizen and peer in his individual capacity for offences committed either in his official or personal capacity. The trial is the trial of an offender, and the judgment is that of a court, the highest in the kingdom, whose process issues to enforce its judgments, even to the taking of the life of the person convicted. It tries and convicts of murder and of larceny upon an impeachment, and as an appellate court it tries the rights of liberty and property, and pronounces and enforces its judgments and decrees at law and in equity.

The Senate can judicially try only upon impeachment, and it can try, not the citizen for committing crime, but only an officer, as such, for the sole purpose of deposition from his office and eligibility. Its judgments can be enforced only by means of judicial process from the courts of law, construing and acting upon the judgment of the Senate as upon a law of the State.

One deposed from office by the judgment of the Senate

may be kept from office only by the courts, the power of the Senate being exhausted by the rendition of its judgment. But the judgment of the Senate even will not be enforced by the courts, if the judgment be not authorized by the law of the land, of which the courts cannot refuse to determine.

The Senate must have jurisdiction of the officer or it cannot try him. If the Senate postpone the trial to a day when the officer ceases to exist, it doth forthwith postpone and divest itself of jurisdiction over the matter charged, of power over the officer, of the power to render a judgment, and there is no other logical sequence, in my judgment, than that it postpones the case out of its jurisdiction, and so there is nothing further upon which the Senate or court can operate. In other words, the case is dismissed, gone out of existence so effectually that it cannot breathe again; no power can restore it, and the accused is discharged from the custody of the court.

It cannot be said with any degree of plausibility that the constitutional provision, that the officer impeached shall be "deemed under arrest and disqualified from performing any of the duties of the office *until acquitted* by the Senate," contemplates an acquittal only by a vote of "not guilty."

An *acquittal,* as I understand it, is a discharge by virtue of any action of the Senate whereby it refuses expressly or otherwise further to entertain the case or act upon it, or which places the cause beyond its reach, and by which it has no longer any power or authority to render a judgment upon the guilt or innocence of the officer.

The Senate has already established this as the correct interpretation, in the case of the impeachment of a high judicial officer of this State, by its vote that the prosecution be discontinued and the case dismissed. Upon this the officer resumed, without question, the duties of his office. If the constitutional provision referred to contemplates a vote of "not guilty," or any judgment upon the merits of the charges,

then is the judge of the Sixth Circuit still suspended, and incalculable mischief and wrong done to the people by his subsequent unauthorized action. I am of the opinion, and I submit that any action of the tribunal in question which precludes a further proceeding in the case pending before it, necessarily terminates the case as effectually as though it were dismissed in express words. It puts an end to the case absolutely, and necessarily discharges the party from the arrest.

The right to a trial on the part of the accused is as sacred as the right to try on the part of the accuser.

The power to suspend and postpone the trial and to resume it depends upon the jurisdiction. The right to arrest and suspend from office depend upon the power to give a trial and to convict or acquit. The Constitution contemplates a trial, and the power to try once gone, all the consequences of the accusation cease. A refusal to try is a refusal to convict.

Without denying the power claimed on the part of the House of Lords to proceed at its next session after a dissolution of the Parliament and to conclude any business begun and not concluded, and not denying the power of the Senate to adjourn and postpone the trial of an impeachment to a day when it may proceed to try the officer accused, it is my judgment that the postponement to a day when it will have no jurisdiction of the officer, is an absolute dismissal of the mattor from the further consideration of the Senate, and a discharge of the accused must follow as a matter of law.

So concluding upon the premises stated, I must, upon my convictions of duty, say that, in my opinion, Governor Reed has the right officially to solicit the opinion of the court, whenever, after the adjournment of the Legislature, he saw fit to do so; that he had a lawful right after such adjournment to resume the power and proceed to the discharge of the duties pertaining to the Executive Department whenever he saw fit. Yet it was wise to address the constitutional

advisers of the Executive upon the matter before resorting to any measure which would have disturbed the peace of the community.

As my brethren have come to other conclusions as to their duty; have formed other opinions as to the status of the proceeding in question, or that the Senate alone can determine the effect of its action by an express declaration, while I regret to be obliged to differ from them, I am equally obliged, out of respect to the law, cheerfully to acknowledge that my conclusions are not legitimate, for so the court decides. And I respect its opinions, as all good citizens should, notwithstanding any differences of private judgment.

In the matter of the Executive Communication of the 23d of September, 1872.

A pardon reaches both the punishment prescribed for the offence and the guilt of the offender. If full, it remits the punishment and blots out of existence the guilt, so that in the eye of the law the offender is as innocent as if he had never committed the offence.

Executive Office,
Tallahassee, Fla., Sept. 23, 1872.

Sir: I wish to obtain the opinion of the Judges of the Supreme Court upon the question whether the pardon of an individual, after conviction, restores the rights forfeited by the conviction. An immediate answer is necessary for my official guidance, and the information of the inspectors of the election now approaching.

Very respectfully,
Your obedient servant,
Harrison Reed,
Governor of Florida.

Hon. E. M. Randall,
Chief Justice Sapreme Court.

SUPREME COURT ROOM,
Tallahassee, Fla., September 27, 1872.

To His Excellency HARRISON REED,
Governor of Florida:

SIR: In reply to your communication as to the effect of a pardon under the Constitution and laws of the State of Florida, I would respectfully state that "a pardon reaches both the punishment prescribed for the offence, and the guilt of the offender. When the pardon is full, it remits the punishment and blots out of existence the guilt, so that in the eye of the law the offender is as innocent as if he had never committed the offence. If granted before conviction, it prevents any of the penalties and disabilities consequent upon conviction from attaching; if granted after conviction, it removes the penalities and disabilities and restores him to all his civil rights. It makes him as it were a new man, and gives him a new credit and capacity. There is only this limitation to its operation: it does not restore offices forfeited or property or interests vested in others in consequence of the conviction and judgment." (Ex parte Garland, 4 Wallace, 380.)

This is the language of the Supreme Court of the United States when determining the effect of a full pardon by the President of the United States. There is nothing in the Constitution or laws of this State to vary its effect here.

For the Court.

Very respectfully,

JAMES D. WESTCOTT, JR.,
Ass. Justice Supreme Court of Florida.

IN THE MATTER OF THE EXECUTIVE COMMUNICATION OF JANUARY 16, 1873.

1. A new county for judicial purposes only cannot be formed in any county already established.
2. The boundary lines of a county may be changed by a two-thirds vote of both houses of the Legislature.
3. A new county, with all the rights and privileges of a county, cannot be created under the Constitution.

EXECUTIVE OFFICE,
Tallahassee, Fla., Jan. 16, 1873.

SIR—I have the honor to transmit to you the enclosed communication which I have received from the Clerk of the Assembly, notifying me of the passage by the Legislature of a Joint Resolution requesting me "to ascertain the opinion of the Supreme Court as to whether or not, under the Constitution of this State, a new county for Judicial purposes only can be formed in any county already established; whether or not county lines can be changed without an amendment to the Constitution; and whether or not a new county, with all the rights and privileges of a county, can be created without an amendment to the Constitution," and to request, in conformity with the constitutional provision, the opinion of the Supreme Court upon the question proposed.

Very respectfully,

O. B. HART,
Governor.

Hon. E. M. RANDALL,
Chief Justice Supreme Court.

SUPREME COURT ROOM,
Tallahassee, Fla., Jan. 24, 1873.

His Excellency O. B. HART,
Governor of Florida:

SIR—By your communication of the 16th, you require our opinion upon three questions:

First. Whether under the Constitution of this State a new county for judicial purposes only can be formed in any county already established.

Second. Whether county lines can be changed without an amendment to the Constitution.

Third. Whether a new county, with all the rights and privileges of a county, can be created without an amendment to the Constitution.

A new county cannot be created for judicial purposes only. It is impossible, from the very nature and incidents of a county organization, that it can exist alone for judicial purposes. If it be a county, it must be embraced within the proper legal definition and description of what constitutes a county. Counties are local subdivisions of a State existing for public purposes, having certain incidents and powers prescribed by the supreme power of the State.

The judicial power exercised within a county is but one incident attaching to a county organization. There are many other incidents which must exist to constitute a county organization.

The Constitution restricts the jurisdiction of the several Circuit Courts to the counties named. It provides that "the several judicial circuits shall be as follows: The First Judicial Circuit shall be composed of the counties of Escambia, Santa Rosa, Walton, Holmes, Washington and Jackson," and so on, describing each circuit by naming the counties which shall constitute it. If a new county is established having a different name from that mentioned in the Constitution, the Circuit Court would have no jurisdiction over such new county. The necessary result of

these views is that the Legislature cannot under the Constitution create a new county forjudical purposes only, nor can it create a new county and extend to such new county the jurisdiction of the Circuit Court.

The territorial subdivisions of a judicial circuit are described as counties in the Constitution. A name is given to each subdivision, and the jurisdiction is necessarily limited to such named subdivisions. A new subdivision constituting a new county could not be the same as that named in the Constitution. It is not within the power of the Legislature to create a new and different county and extend to such new county the jurisdiction of the Circuit Court, as its jurisdiction can neither be enlarged nor diminished by the Legislature. It would require, therefore, an amendment of the Constitution to create a new county with "all the rights and privileges of a county."

Can county lines be changed without an amendment of the Constitution, is the next question which we are required to answer. It is clear that the change of county boundaries does not change the identity of the county whose boundaries are changed. The identity of each is preserved, and the existence of each county, though having a changed boundary, dates from the act creating the county, and not from the act changing the boundary. The Constitution (Sec. 2, Art. XIII.,) provides that all counties shall remain as now organized, unless changed by a two-thirds vote of both houses of the Legislature. This clause in the Constitution occurs in that Article which provides for an enumeration of the inhabitants and an apportionment of the representation, which is to be made in the year 1875. It is, however, in a different section from the section providing for the enumeration.

Is not the boundary of a county a part of its organization within the meaning of this clause? It is unquestionably true that there cannot be a county without a boundary. In organizing a county, that which is first to be done is to de-

fine its boundaries and to mark out the territorial extent and limit of the political subdivision to be designated by the name of the county. A county without boundaries cannot be called an organized county. There can be no such thing. This limitation upon the general power of the Legislature is preceded by a clause prohibiting an entire separation of any two or more counties composing the same Senatorial district. The reasonable conclusion is that it was the intention of the Convention to make permanent the then existing county organizations, and that the distribution of political power made to county organizations under the Constitution should not be altered except by a two-thirds vote of the two houses of the Legislature. To change the boundary lines of two counties would defeat the intention of the framers of the Constitution in this respect. It is our opinion, therefore, that the boundary lines of a county may be changed by a two-thirds vote of both houses of the Legislature without an amendment to the Constitution.

For the Court.

Very respectfully,

JAMES D. WESTCOTT, JR.,

Associate Justice Supreme Court Florida.

DECISIONS

OF THE

Supreme Court of Florida.

APRIL TERM, 1873.

HARBY MOSES, SURVIVING PARTNER, &C., APPELLANT, VS. JOHN T. GILCHRIST AND SON, ET AL., RESPONDENTS.

After trial and verdict, without exceptions taken, and a refusal of a new trial by the Court below, this Court will not interfere to disturb the verdict, if there is any evidence, though slight, to support it, and there is no ground to conclude that the jury were influenced by other considerations than the evidence. The verdict in the present case seems to be fully supported by the evidence.

The Court trying the cause should be accorded a liberal discretion in granting or refusing a new trial.

Appeal from the Circuit Court, Fourth Judicial Circuit, Duval County.

A statement of the case is contained in the opinion of the court.

E. M. L'Engle for Appellant.

J. M. and *H. J. Baker* for Respondents.

FRASER, J., delivered the opinion of the Court.

This is an action brought by the plaintiff as surviving partner of T. J. Moise & Co., against John T. Gilchrist & Son and John S. Sammis, jointly, upon a promissory note made by Gilchrist & Son, July 12, 1869, for $2,000, payable

sixty days after date to their own order, and endor them and by John S. Sammis in blank, and again en by Gilchrist & Son to Chas. Slager, and by him to & Co. This note and another of the same tenor, but July 10, were to be used by Slager in taking up cert ceptances, of Gilchrist & Son held by Moise & Co. 24th of July, Slager, without taking up the accep specified, delivered the notes to Moise & Co., who cl have held them henceforth as collateral security for t ceptances, then amounting to $5,670.15. The note o 10th was negotiated by Moise & Co., and at maturit and taken up by Gilchrist & Son, Moise & Co. loan them $500 for that purpose. This was on the 11th S ber. On the 30th of August Gilchrist & Son paid M Co. $1,500, and on the 24th September $2,000 more count, and Moise & Co. then surrendered to Gilchrist all their unpaid paper, except the note upon which t tion is founded, which they retained, as they say, as s for the balance due them.

On the trial, Sammis insisted that he was but an a modation endorser, and was not liable to pay the no cause the plaintiffs were not *bona fide* holders for val note being held by them as collateral security for a p isting debt of Gilchrist & Son, and contrary to the p for which it was endorsed by him, and that the subs loan of $500 by Moise & Co. to Gilchrist & Son crea liability as to him.

The court charged the jury that the note sued on w joint and several promissory note of Gilchrist & Sc Sammis—that it was endorsed by Gilchrist & Son to and by him to plaintiffs to secure the payment of cert ceptances of Gilchrist & Son, in the hands of plaint the date of the execution and delivery of the note to and by him to plaintiffs.

That if they should find for the plaintiff, the meas damages would be such amount as they should find

the evidence to be unpaid upon the indebtedness of Gilchrist & Son in the hands of Moise & Co., at the time of the receipt of the note by Moise & Co., to the extent of the amount of the note and interest.

That should they find that Gilchrist & Son, prior to the commencement of this suit, had paid off these acceptances, for which the note sued on was held as collateral, that they should find for the defendant, and that they were the exclusive judges of the evidence, its weight and credibility.

That where an agreement is made between the holder of a promissory note and the maker, based upon a valid consideration to give additional time for payment, without the knowledge or consent of the surety or endorser, such agreement releases the surety or endorser from liability on the note.

That if the jury find that this note was given as collateral security to the plaintiff to secure a previously existing indebtedness between the plaintiff and Gilchrist & Son, Sammis, as endorser or surety on such note, would not be liable for any subsequent advances or transactions between the plaintiff and Gilchrist & Son, made without his knowledge or consent.

That if the jury find that Moise & Co. received the note as collateral security for the payment of a debt of Gilchrist & Son, previously existing, all payments made by Gilchrist & Son subsequently to the making of the note must be applied to the extinguishment of said debt thereon existing. And at the request of plaintiff's counsel the Court added this modification: "But the Court charges you that John S. Sammis was a joint and several maker of said note together with the said John T. Gilchrist & Son; and the Court further charges you, that John S. Sammis is liable for payments made by plaintiff for the benefit of Sammis."

The verdict was for plaintiff for $283.10.

The plaintiff's counsel moved to set aside the verdict and

for a new trial, on the grounds that the verdict was contrary to the evidence and charge of the Court.

The court denied the motion. the plaintiff appealed and assigns the denial of the motion for error.

The principal if not the only ground of plaintiff's complaint of the verdict, appears to be the disallowance by the jury of the item of $500 loaned by Moise & Co. to Gilchrist & Son on the 11th September, 1869, for which plaintiffs insist that Sammis is liable to them, and that therein the verdict is contrary to the evidence and the charge of the Court. The Court below manifestly did not so understand it, else a new trial would have been granted them.

If the jury came to the conclusion, as they manifestly did, and we do not see to what other conclusion they could come, that the amount of unpaid indebtedness of Gilchrist & Son to Moise & Co. at the date of their receiving into their hands the note in suit had all been paid, except $170.15 and interest, and that the $500 was a subsequent advance made to Gilchrist & Son without the consent of Sammis, the verdict in this respect conformed strictly to the evidence and the charge of the Court.

The plaintiff swears that on September 24, 1869, Gilchrist & Son paid $2,000, which will be found by computation to have reduced the principal of the old indebtedness to $170.15, and that Moise & Co. then gave up all the Gilchrist paper except the note in suit.

George D. Gilchrist swears that it was understood by the Gilchrists and Moise & Co., that all was paid except $170.15, interest, protest fees, and the loan of $500.

This loan of $500 was made September 11, 1869, thirteen days before the final transaction and taking up of Gilchrists' other paper, and made for the purpose of taking up the note of July 10th, then matured, and consequently no part of the Gilchrists indebtedness at the time the notes were pledged.

It is insisted, however, by the plaintiff that the $500 advanced by Moise & Co. to Gilchrist & Son, September 11th

1869, was a payment for the benefit of Sammis, and therein the verdict was contrary to the charge.

The jury may have with reason concluded from the evidence that the $500 was no part of the original indebtedness; was loaned to Gilchrist & Son without reference to Sammis, without his consent and without any stipulation as to security, and was not a payment for the benefit of Sammis nor upon the credit of the note, but upon the credit of Gilchrist & Son alone, and to relieve Moise & Co. of the necessity of taking care of the note then matured.

From the whole case, and all the transactions connected with this paper, were not the jury justified in believing that Gilchrist & Son were the principal debtors, and Sammis but a security? All the business was transacted with Gilchrist & Son, all payments made by them. Sammis was neither called on nor consulted, nor knew anything of these transactions. The notes were first given to Moise & Co. by Gilchrist & Son through Slager, and to all this the plaintiff testifies.

In the arrangement of 11th September, plaintiffs cash a draft of $2,250 to Gilchrist & Son, and loaned $500 more, in all $2,750, the draft itself being more than enough to take up the note; Gilchrist & Son pay the note and have a large surplus left. Was this surplus advanced to Gilchrist & Son for Sammis' benefit? The jury manifestly believed that it was not, but a new transaction involving other matters than the original indebtedness for which the notes were pledged. With these facts before them, we do not see wherein the jury have given their verdict in opposition either to the evidence or the charge of the Court.

After a trial and verdict, without exceptions taken, and a refusal of a new trial by the Court below, this Court will not interfere to disturb the verdict, if there is any evidence, though slight, to sustain it, and there is no ground to conclude that the jury were influenced by other considerations than the evidence.

The Court trying the cause should be accorded a liberal discretion in granting or refusing a new trial.

The question whether the Court erred in the charge to the jury, or in the admission of evidence, is not before us, and upon that we give no opinion.

The judgment of the Court below is affirmed and the cause remitted for further proceedings.

WESTCOTT, J.

The verdict in this case conforms to the evidence, and I agree to an affirmance of the judgment for that reason.

DECISIONS

OF THE

Supreme Court of Florida.

OCTOBER TERM, 1873.

SAMUEL B. STEPHENS, ET AL., APPELLANTS, VS. RHODA E. GIBBES, APPELLEE.

1. Under the Statute of November 7, 1828, (Thomp. Dig., 184,) where express provision is made for the widow in the last Will and Testament of the late husband, she is required to dissent thereto within twelve months from the probate of the Will in order to an assignment of dower. At common law no time within which an election should be made was prescribed. The effect of this Statute is to fix the period during which she may elect. If that time expires, the provision made in the Will becomes obligatory upon her and her right of election is lost.

2. The loss of a large portion of the estate through the emancipation of the slaves four years after the provisions of the Will had been accepted, and the consequent insolvency of the estate, does not present a case in which, either before or since the Statute, a Court of Equity would set aside the election and award dower.

3. The Act of December 13, 1861, suspending the Statute of Limitations, did not have the effect to revive a right of election under the Statute of November 7, 1828, which has ceased to exist by expiration of the time therein limited for its exercise; nor is an election once made set aside and a right to elect again created by the provisions of Section 3, Article XV, of the Constitution of this State.

Appeal from the Third Judicial Circuit, Madison County.

This is a suit in chancery, instituted by Mrs. Rhoda E. Kilcrease, (now Gibbs,) against Samuel B. Stephens and Samuel B. Love, surviving executors of the last will and

testament of Wm. E. Kilcrease and Albert Kilcrease, a
of William E. Kilcrease. While the suit was pending,
after answer filed, these executors being removed and
Shepard being appointed administrator *de bonis non*
the will annexed, he was made a party.

The suit is to recover dower in the lands, tenements,
of her husband. The will, which is dated January 7, 1
directs the executors "to keep the planting interest up
the space of seven years for the purpose of paying the
debts of the testator." After the payment of debts,
testator directs the whole estate to be divided betweer
wife and children, share and share alike. In the ever
any of the children dying without issue, then it is dir
that the portion of those dying shall go to the survi
and in the event all should die without issue, then the s
going to them should be divided into two equal port
one to go to his wife, the other to his brothers. Und
codicil the testator directed his executors, immediatel
his death, to deliver to his wife a number of negroes
gether with all the household and kitchen furniture,
two carriages and horses belonging thereto, in additio
the provision made for her in the will. In this pro
she was to have an estate in fee.

Samuel B. Stephens, Samuel B. Love, R. A. Waller
Daniel F. Gilchrist were named executors. Willian
Kilcrease died on the 8th of May, A. D. 1860. On the
of May, A. D. 1860, the will was admitted to probate ir
probate court of Gadsden county, and Stephens, Love
Walker qualified as executors. Walker died before th
stitution of the suit, and during his life had but little t
with the estate. Plaintiff through her bill alleges that
tator at his death was possessed of a large estate; tha
real estate consisted of three valuable plantations in G
den county, one in Calhoun, and large bodies of unimpr
land lying in Gadsden, Wakulla and Liberty coun
amounting in the aggregate to many thousand acres, al

house and lot in the town of Quincy, and several other parcels and lots of land; that the personal property consisted of 177 slaves, appraised at $135,550; other personal property appraised at $16,240; of good notes $21,920; of doubtful notes $6,000, and of other moneys and choses in action. That the executors, during the time they were in possession of the property, became possessed of a large amount of personal property through the cultivation of crops, from rents and issues of the property, embracing 353 bales of short staple cotton, 450 of long staple, 28,000 lbs of tobacco, 45,500 bushels of corn, 50,000 bushels of oats, 2,000 bushels of sweet potatoes, 300 bushels of rice, 200 bushels of peas, 100 bbls of syrup, 30,000 lbs. of pork, 75 head of beef cattle, and other articles, which plaintiff was unable to specify.

That the assets aforesaid prudently administered would have been sufficent to have discharged all of the debts of the estate, leaving an ample support for herself and children. That she is informed that there is still a very large indebtedness still remaining unpaid; that it is doubtful whether the assets, including the lands, at present prices, are sufficient to pay the debts; that the creditors seeking to recover their debts have been restrained by an injunction, issuing from the court of chancery, at the suit of the executors, "upon a showing in their bill to the effect that on account of the emancipation of the slaves, and other grounds stated therein," the estate would be reduced to insolvency; that the executors have been authorised by decree to sell and dispose of the remainder of the estate for the purpose of paying the demands of the creditors, and that if such decree is executed, plaintiff will be deprived of all benefit in the estate. That she has never accepted of the provisions of the will, and that the only money that she has received from the said executors was $600 in legal tender notes of the United States, and some Confederate notes, the amount of which she does not recollect. That having implicit confidence in the executors, she signed and sealed such papers as they

presented to her without a knowledge on her part of th contents and without being informed by them of their pu port and effect, and that, if any paper is in existence b which she is deprived of any right of dower which sh might have possessed, or of any acknowledgement by her c her assent to the provisions made for her "*in the body o the said will,*" such papers were executed by her witho any such intention or knowledge of their effect; that short time after the death of her husband and while she wa in great grief, one of said executors brought her a paper t sign, which she did but the contents of which she did nc then know, but has since been informed that it was a receip for the specific legacies given to her in the codicil to th said will. Plaintiff then alleges that she is dissatisfied wit the will, that she dissents to it and that she claims an elects to take her dower in lieu of what is devised to he under the will; that the receipt for the legacy under th codocil was signed a short time after the death of her hu band, while she was in great grief, before she knew anything of the condition of the estate, denies that she had a intention thereby of waiving any legal right of dower whic she had, and claims a present right of election, and also i sists that if she has made an election, its circumstances a such as that it should be set aside, and she be restored her right of dower.

Love and Stephens, the executors, in their answer adm the execution of the will, the death of the testator, the pr bate of the will and their qualification as executors as state They allege that under the provisions of the will a "han some" provision was made for plaintiff, it being one-thir or a child's part; that under the codicil there was still further bequest amounting in value to over $12,000; th in conformity to the request of the testator, this proper was delivered to the widow immediately after the death her husband, and that she accepted the same; that the w was admitted to probate on the 14th of May, 1860, a

that plaintiff has never expressed her dissent to the provisions of said will, as required by the statute, and not until the filing of her complaint in this action on the 3d of Feb'y, A. D. 1869; that said codicil was added at the plaintiff's own solicitation, the slaves therein mentioned were selected by herself, and she expressed herself fully satisfied with the provisions for her in said will and codicil; that this property was delivered to her and the receipt taken for it. They deny having practiced any fraud, aver on the contrary that the receipt was taken by the brother of the plaintiff, who was one of the executors then residing with the plaintiff; they affirm that not only was the very valuable property bequeathed to her under the codicil accepted by her, but that they had frequent conversations with her in regard to her ultimate share of the property upon final settlement, and that such conversations occurred long after the time for filing her dissent to the will had expired. That believing that her election to take under the will had settled these questions, they proceeded to discharge the trusts of the will. That they settled the indebtedness of the estate to the amount of $180,000, and continued to make such settlement during the war; that upon the close of the war, through the emancipation of the slaves and the depreciation of the value of real estate, the estate becoming insolvent, they filed their bill in chancery, setting forth these facts and praying a decree directing a *pro rata* payment of the creditors.

After the filing of the answer, the defendants, Stephen and Love, were removed as executors, and E. S. Shepard being appointed administrator *de bonis non*, with the will annexed, was made a party to the suit.

The amended complaint and answer attending these proceedings we deem it unnecessary to refer to, as they do not change the case made by the original bill and answer.

Evidence for Plaintiff.

The only exhibit in the case is the last will and testament. Its provisions, so far as they affect the case, have already been stated.

Testimony of Mrs. Gibbs (late Kilcrease,) the plaintiff:

She states that after the death of her husband, the executors informed her that she would not receive anything from the estate except the special legacy; that if she took from her father's estate a note of General Kilcrease for $6,000 due that estate, then she could receive payments on that account; that she took the note and received several payments on it during the war in Confederate money, and also $600 in greenbacks after the war in 1865. That she received nothing whatever from the estate except on account of said note with the exception of some supplies, which she was in the habit of sending to the plantation for, being informed that the executors got similar supplies; that most of the servants derived from the special legacy were her own individual property, given to her by her father; that she received nothing for the support or education of her son; that had she not received assistance from her mother and brother, she would have been in a destitute condition; that during the war she had frequent conversations with S. B. Love, one of the executors, but made no special inquiry into the affairs of the estate as she had at that time implicit confidence in the executor as a trusted friend of her late husband, and was only undeceived in 1865, when she was informed that she must leave the house which she had occupied, as she paid no rent for it. That up to that time she was entirely unaware and ignorant of her rights in regard to dower, never having been told of them, and being without any legal knowledge or information; that as soon as she was informed of her rights and of her being left in a most destitute condition, she immediately took steps to assert her rights; that as soon as she

did this, the executors sued her for $8,000; that her actic was first brought in the U. S. Courts.

Plaintiff placed in evidence her receipts to the executor for the sum of $7,327.86, extending from May 22, 1862, t August 19, 1865, some of the receipts being on general a count, others for moneys received on plaintiff's claim und the note she held against the estate, also her receipt for th property she received under the codicil.

Evidence for Defendants.

The will and codicil, and the receipt for the special legac all of which have been stated.

S. B. Love, one of the executors, and the only witness e amined for the defendants, testified that he was present whe the will was made and executed; that a short time after was executed the testator asked him to recall Mr. Stephen who had written the will; that after a short conference b tween them, Mr. Stephens drew up the codicil and Mrs. Ki crease was called into the room and it was read to her, an she expressed herself upon inquiry from her husband to t entirely satisfied. He states that Mrs. Kilcrease was prese when the will was made, and that she subsequently receive and receipted for the special bequest, without expressin any dissatisfaction with the will; that the estate was entirel solvent and was considered very valuable; that he had th principal management and control of the property durin the war. That during all of this time, Mrs. Kilcrease wa permitted to occupy a dwelling-house of the estate free c rent, and drew all her supplies from the plantation, it bein the purpose of the executors to arrange the matter of charg upon the final settlement of the estate; that during th time plaintiff frequently conferred with witness about th success of the planting interest, the prospect of the estat paying out of debt without a sale of property, and the prob ble distributive share, and that plaintiff never expressed an dissatisfaction with the will until in the year 1866, abou

six years after the death of the testator. The plaintiff was fully advised by him as to the condition of the estate; that the estate was always deemed solvent, and it was supposed that there would be a large amount for distribution, until the emancipation of the negroes and the decrease in value of real estate.

Upon the hearing of a motion for a reference, judgment allowing dower and appointing a referee, with general powers looking to its assignment, was made.

Upon exceptions to this order of reference and judgment, this appeal is now prosecuted.

The general question presented is: Is the widow, under this state of facts, and at this time, entitled to dower in the estate?

Stephens & Love and *McGill* for Appellants.

The question now at issue between the parties is whether the plaintiff, under the circumstances, is entitled to dower in the estate of her late husband, it appearing from the record that said deceased died testate and that the plaintiff neglected to dissent from the will so left within twelve months from the date of letters testamentary.

The defendants hold that the plaintiff is barred of dower, not alone by the statute of the State, which supercedes the common law and governs and controls in all cases for application for dower, but by the common law also, admitting that to be in force; and as the plaintiff insisted upon her rights in the court below under the common law, and the court there predicated its decision principally upon the common law, we will first examine this law as settled by modern decisions. And that we may be the better able to apply the principles of the common law to the case under consideration, we will keep in view the important distinctions as to the nature and character of the estate or property in which a widow is dowable in this State and at common law.

At common law the widow was entitled to dower only in the real estate. Adam's Eq., 51; Bacon's Abr., 191; 1 Bright, H. and Wife, 321. In this State she is entitled to dower both in the real and personal property. Thompson's Digest, 185. In order to put the widow to her election or deprive her of dower at common law, it must appear that the testator meant to exclude her from it, as where there is an inconsistency between her claim to dower and the disposition to her by will. 3 Ves. 249; 2 Rop. on Leg., 414. It is apparent in this case that it was the intention of the testator to exclude the widow from dower.

By reference to the will and codicil we find that a large special legacy is left the widow of property out of which she would be dowable,and the executors required to perform acts entirely inconsistent with her claim of dower.

It cannot be presumed that the testator intended to give his widow a special legacy of the value of $12,000, and an equal portion of the balance of his estate with his children, in addition to her dower, or one-third of the gross amount of his estate. In all the leading cases at common law, where it was apparent that the testator did not intend the bequest in addition to dower, the widow was put to her election. 2 Ves. & Bea., 222; 2 Rop. on Leg., 424; Sim. & Stew., 513; 2 Rop. on Leg., 424, 425; 4 Mad. 125; 5 Mad. 45, 62; 2 Will. Ext'rs, 124 and 1,241. The principles governing all the cases adjudicated by the common law judges are fixed and well determined. The only difficulty consisted in ascertaining the intention of the testator. Amb. 732.

The true way of ascertaining the intention of the testator is to look into the will and see whether it is plain that he could not have given what he had, consistently with the widow's claim to dower. 2 Ves. Jr., 572. In this case we find the widow generously provided for, the intention of the testator to exclude her from dower unmistakable. Having seen that this case is one that under the common law would put the widow to her election, let us now see whether under

principles as settled she has not made her election to
e under the will. The acts and circumstances that have
n deemed an election under the common law are various,
each case depends to a great extent upon its own par-
lar circumstances. 2 Story Eq., 1,097. A receipt of an
rest or legacy under a will devising away real estate and
perty to which the widow would be entitled as dower,
n election. 2 Rop. on Leg., 427. In this case the widow
ived and enjoyed the special legacy under the will since
y, 1860. It is a principle of equity that a person who
pts a benefit under an instrument must adopt the whole,
ng full effect to its provisions and renouncing every right
nsistent with it. 1 Ves. Jr., 172, note *a*, and cases there
d; 1 Leading Cases Eq., 289; 7 Cranch, 378. The
ow in this case did accept a large benefit under the will
her late husband, to-wit: $12,000. In addition to which
has acquiesced in the provisions of the will for a long
e of time, to-wit: from May, 1860, to the filing of her
a period of more than seven years. Thus we see that
ommon law, the plaintiff would not only have been put
her election, but from her acts and long acquiescence
ld be deemed as having made her election to abide the
. it cannot be said that the election was made in ignorance
nder misconception of facts, for the evidence is that it
her own brother, one of the executors, to whom she han-
the receipt for the special legacy. That another of the
cutors had frequent conversations with her on the subject
he status of the estate, and that she was by him fully in-
med, and that she never at any time before the close of
late war expressed any dissatisfaction with the provis-
made for her. But if she had not been thus informe
could have compelled a discovery to enable her to ma
iscriminating and deliberate choice. 2 Story Eq., 1,0
he absence of proof that plaintiff was in ignorance of t
status of the estate, that any important fact was c
d from her by the executors, or that she took any s

to gain the necessary information, she must be presumed to have made her election with a full knowledge of the facts and circumstances relative to the estate.

We now come to examine the plaintiff's claim to dower under the statute as it is. This and not the common law must govern in this case. Upon examination we find that all the uncertainties and indefiniteness of the common law as to the intention of the testator, the force and effect of the will, the rights and privileges of the widow, disappear in the light of the statute, and the question as to whether the widow shall be put to her election, the time when it must be done, the mode and manner of doing it, the effect and consequences of making or of neglecting to make it at the proper time, are all pointed out and definitely fixed by the statute of the State. Thomp. Dig., 184.

The first section of the act tells when a widow is entitled to dower. The first and second inclusive tell us in what property she is dowable and the quantity and estate she takes. When any person shall die intestate, the widow shall be entitled to dower as a matter of course.

If any person shall die testate and not in his will make any *express provision* for his wife, or such as shall be satisfactory to her, such widow may signify her dissent thereto in the Circuit or Probate Courts of the county where she resides at any time within one year after the probate of such will, and then and in that case she shall be entitled to dower.

According to this statute, if there be a will, no matter what its character may be as it relates to the widow, she takes dower, if at all, upon conditions precedent.

In all cases where there is a will, the widow is bound by it unless she expressly dissents thereto within the time limited by the act. After the expiration of twelve months, she is presumed to have acquiesced in the provision made for

nd the estate then vests according to the provisions of
ill.

this State the will is presumed to disclose the intention
e testator in regard to his widow as well as to all oth-
and she is presumed to acquiesce in that intention,
her it be generous or parsimonious, unless she dissent
to within the time and in the manner prescribed by
tatute.

common law, the widow was entitled to take dower
in the real estate. It therefore often happens where a
or made to her a bequest of personalty in which she
not dowable, and did not signify by word or clear im-
ion that such bequest was to be in lieu of dower, it was
med he meant the bequest in addition to dower. Un-
ur statute no such presumption can arise. The widow
dowable in all the property, real and personal, and in
ase can the widow take under the will and also take
r, unless it is expressly provided in the will that the
st is to be in addition to dower. The order of things
ey existed under the common law is by our statute
sed.

common law it must be expressed or clearly implied
e will that it was the intention of the testator to ex-
the widow from dower. Under our statute it must
y and unmistakably appear that it was his intention
rmit her to take dower in addition to the bequest. At
non law there was no time limited in which a widow
required to make her election—no particular mode or
her prescribed in which she was to make it. Under
tatute it is different and the difficulties and uncertain-
heretofore presenting themselves under the common law
voided. She may not accept any benefit under the will,
any act that can be construed as accepting or electing,
f she neglect or fail to dissent to the will within the
nd in the manner prescribed by the statute, she is pre-
l to have acquiesced and is barred of dower. The 3

section of the act, Thomp. Dig., 185, is to be taken and co
strued in connection with the 1st and 2d sections.

In case the husband dies intestate, the widow may ele
between dower and child's part within one year from da
of letters of administration.

In case he dies testate, the widow must first dissent fro
the will and then elect between dower and child's part, b
she must be entitled to dower before she can elect betwe
that and a child's part.

It is contended by plaintiff that under the 3d section
the 15th article of the Constitution, the right of the wido
to elect to take dower is revived. All the authorities, ar
they are numerous, are opposed to such a propositio
Claims against an estate once barred are cut off entirely; 1
legislative enactments can reinstate or revive a dead clair
13 Fla., 416; 1 How. Miss., 183. After the lapse of twel
months from the date of the probate of the will, the enti
estate vested in accordance with its provisions and becan
subject to the payment of debts, legacies, etc., in the han
of the executors.

Held by the court below that the statute of December 1
1861, suspended the statute of limitations then in force
relation to civil actions; that this was a civil action ar
that consequently the act, Thomp. Dig., 184, limiting tl
widow to one year in which to dissent from the will, w
suspended.

This is erroneous, 1st. Because the act of 1828 giving tl
widow the privilege of dissenting to the will of her decease
husband within twelve months, although it limits her priv
lege, and is to that extent in the nature of a statute of lim
tations, yet it is not what is technically known as the statu
of limitations, which limits the commencement of civ
actions.

It is more in the nature of a statute of non-claim and w
not suspended or referred to by the statute of December 1
1861. 13 Fla., 416.

2. Because the time in which she was required by statute to make her dissent expired anterior to the passage of the act of December 13, 1861. Her privilege to dissent from the will and elect to take dower, was therefore barred before the passage of the act.

The policy of the act limiting the widow to twelve months in which to make her election, is evident when we consider the embarrassment and delay which would otherwise arise in the due and proper administration of the estate.

This policy has been adopted by most of the States by statutory provisions.

In North Carolina and Tennessee, any provision by wi bars the widow of dower unless within a certain time sh dissents from the will. 2 Devereux Eq., 338, 372; Meig R., 378; 6 Humph., 220.

In Massachusetts, Ohio and Alabama, the widow mu dissent within six months after probate or she is bound the will. 12 Pick., 146; 10 Ala., 997; 14 Ohio, 610, 64 Similar statutes are enacted in New Jersey, Delawar Pennsylvania and New York. In Mississippi the the wido may renounce her rights under the will and insist on dow within six months after probate of will, but if she perm six months to elapse by one day, she will be confined the will. 7 How. Miss., 665.

In this case the assent of the widow is not only impli by her failing to dissent in the period prescribed, but h actual and positive assent is proven by her acceptance of th legacy and receipting for the same, and her dissatisfaction with its provisions is not based upon facts existing at the time of her election, but which subsequently arose, and after she had been for years in the possession and quiet enjoyment of her legacy. Nor has she been deprived of any portion of it by defect of title, or other cause, existing at the time of her election.

M. D. Papy (with whom was *J. W. Malone,*) for Appellee.

The receipt given by Mrs. Kilcrease, now Mrs. Gibbes, for the property mentioned in the codicil, can have no effect to bar her dower and furnishes no evidence of an election under the will, for the important reason that this receipt was given shortly after the death of her husband, before by many months the time elapsed within which the law authorized her to dissent from the will. Another reason is that she did not so intend it, but only acted as requested by the executors to give them a voucher against property already in her possession. Another reason—because the property or the most of it was already her own, and she had no idea that in giving the receipt she was affecting her right one way or the other, either under the will or under the law.

Besides, the property bequeathed by the codicil was not given either in lieu of dower or of some other provision made by the will.

The proofs do not disclose any other receipt by her, other than for payments made to her as a creditor holding the note which she derived from her father's estate.

We are brought to consider the effect upon her rights by her failure affirmatively to dissent from the will within twelve months from its probate, and whether, under the circumstances of this case, she is barred of all dower in her husband's estate. If, as we have attempted to show, the receipt for the codicil property should have no weight, because not given with any intent that it should be taken as an election, and because also it was given long before the time expired for her to signify her dissent, we are reduced to the single question whether her not making a dissent in this case within twelve months shall deprive her of all right whatsoever.

The claim of a dowress is the most favored in law. This has long been recognized, for we find that the master of the

rolls, Sir Thomas Trevor, said on one occasion that "the right that a dowress has to her dower is not only a legal right and so adjudged in law, but it is also a moral right to be provided for and have a maintenance and sustenance out of her husband's estate to live upon. She is, therefore, in the care of the law and a favorite of the law. And upon this moral right is the law of England founded as to the claim of dower." 1 Story's Eq., 629, *et seq.* So highly is she favored by the law, that her claim is preferred to all others, and no act of her husband can defeat it. By the common law she could not be deprived of her dower except by a legal jointure, and she could part with her right only by her voluntary act in suffering a recovery, of which our separate examination is the equivalent. In this country, in some States, and perhaps in all, equitable jointures are recognized in substitution of dower, but it must be the equivalent in value to deprive her of her legal right.

In this State, however, there can be no provision by way of jointure or otherwise created by will, or by deed during coverture, that can deprive the wife of her legal right, except by her voluntary assent. In considering this subject the question naturally arises whether it could have been possibly in the contemplation of the framers of the law that the wife in any contingency was to be deprived of all right whatsoever, by the mere silent operation of the law, as would be the case here. We but anticipate the answer when we assert that it could not so have been, and further we maintain that the statute never could have intended to lessen the widow's right. The renunciation of or dissent from the will creates no new right; it would rather strengthen the pre-existing legal right of dower. But inasmuch as she is allowed to accept the provision of the will intended to be in lieu of dower, she is required to signify her dissent within twelve months. This alternative is clearly intended for her benefit, and could not have been granted upon the supposition that unless she did dissent, whether she w

aware of the condition of the estate or not, she should be put to the hazard of getting nothing at all from the estate. Our statute creates no forfeiture of the legal right on failure to dissent within twelve months, but goes on to prescribe where dissent is made, how and in what manner she shall be endowed.

This statute, let it be recollected, does not create the right to dower; that existed before and at common law. The law concerning deeds recognizes it, for it provides how it shall be relinquished and is very careful to guard her rights. The statute of wills also recognizes it, and only inferentially affects it by the terms employed concerning the dissent to be made to the will. It is worthy of remark also, that this provision is coupled with the declaration as to the manner of endowment in case of an intestacy, which shows that the manner and extent of the endowment, and not the right itself, was in contemplation. It surely could not have been designed that if a husband, disposing of all his property by will, should make no provision at all for his wife, she should still be required to dissent from the will, in order to entitle her to dower. We are aided in our construction on this point by the light of judicial authority, for in Cumming's executors vs. Daniel and wife, 16 B. Monroe, 470, it was said that a widow, whose husband had devised away his whole estate without making any provision whatever for her, may, without renunciation, there being nothing to renounce, claim and recover the portion of his property to which she would be entitled in case of intestacy. The widow, having a right to elect in a proper case, the failure to dissent was, I suppose, to be assumed as an election to take under the will, but this assumption or presumption may be explained like all others, or may be controlled by the court at her instance, as the rights and interest of the dowress may require in furtherance of the obvious purpose and spirit of the law in her behalf. It is manifest that a benefit was intended to the widow, and where this fails, not as the result of her own act,

all the authorities show she is remitted to her dower. In the case of Snelgrove vs. Snelgrove, 4 Dessau., 300, the court manifested the usual care in preserving widow's rights.— The court said in executors of Munroe vs. Roger that it "was by no means inclined to deprive a woman of her legal rights, under the idea of her having made her election merely by a bare acquiescence. But it should be made to appear that she was perfectly conusant of her legal rights, and that she had done clear positive acts indicating her having made her election." In the case of Gist vs. Heirs of Cattell, 2 Dessau., 53, we find in the head note, which is intended to embody the substance decided in the case, and in which, however, the opinion is meagre, the following:

"A person waiving a claim on the ground of a supposed benefit, may revive it on failure of that benefit. So a widow taking a legacy and waiving dower may again set up her claim to dower if the debts take away the legacy."

The rights of the dowress require that upon a positive election to take the will made by mistake as to the condition of the estate, she shall be remitted to her dower, for otherwise what was intended for her benefit would become an instrument of positive and palpable wrong. It is in this view that the doctrine in the citation from DeSaussure was announced. This doctrine is in perfect harmony with the equitable principles which courts of chancery have long established for the protection of married women.

Even as early as the days of Henry the VIII, the principle was incorporated in the statutes of England, for in the statutes of Henry the VIII on the subject of dower and jointure, (I believe it is the statute of uses,) provision is made to indemnify the wife on being evicted of her jointure or any part thereof; and to the same end has legislation been directed in this country, where there has been any legislation on the subject, as in Kentucky. The cases have gone so far, (said the Chancellor in Hall vs. Hall, 2 McCord, 269, 280,) that after the wife has made her election and has

ceived benefits under the will, she has been allowed to retract and resort to her legal rights, when the estate has turned out differently from what it was believed and stated to be at the time of the election prematurely made.

The result in this case would be to exclude the widow entirely from any benefit in her husband's estate. Before there was any payment or assignment of property to her, the circumstances of the estate became changed by the entire destruction of its slave property. The remaining property, consisting mostly of land, is insufficient to pay the debts of the estate. The creditors claim that they are entitled in preference to the widow, who should be confined to the will, and therefore having, as they claim, such preference, they will absorb everything to themselves.

The proposition is that the widow is to be confined to the will in order that she may *get nothing,* and in this matter it is proposed to dispose of a claim of the *highest legal and moral status.* The *"moral right* to be provided for, and have a maintenance out of her husband's estate," and which places her *"in the care of the law,"* is by a provision intended to secure it more amply and certainly to be made utterly worthless.

If the court shall be of opinion that under the circumstances in this case the widow is not remitted to her dower, still we insist that it will not be equitable to require that the consequences following the emancipation of the slaves shall fall entirely upon her, but that they should be distributed so that the creditors and the widow shall bear the same relation to the remnant of the estate as they bore to the original corpus of the property.

If the original estate was equal to the entire payment of the debts, and in addition thereto, also to a provision adequate for the support of the widow, approximating the portion she might have taken as dower, then it would result, from the position we take, that what remains of the estate should be divided between the widow and creditors in the

same ratio, and thus would be preserved a just equity tween them. If the estate at the death was solvent, the widow, under the will, would have taken nothing, cause of there being nothing for her after the payment the debts, then it is admitted, and the authorities show that she could fall back on her dower. This should lessen but ought rather to strengthen the reason why, in case at bar, the widow should have the benefit of a princ of equity which would distribute the loss so that neit should be the entire sufferers; but both should receive relative benefit intended by the will, and which would h followed but for the loss of property. This principle, i admitted, is not of general application, but in the case c widow, who is the special object of care and a favorite of law, there exists rules for her benefit which apply in favo no one else.

The "equitable doctrines which Courts of Chancery h long since established for the protection of married wome and their enforcement by the courts, show that she is dis guishable from all others, *when her rights growing out her marriage relations are concerned.*

If a court will, notwithstanding a *positive affirma election*, allow a widow to fall back on her dower because circumstances were not known at the time of her electi and which when developed showed that she ought not to bound, it is respectfully urged that the like "equitable d trine" should entitle a widow, when matters *ex post fa* sweep away a part of the estate *which would have gone pay the debts*, and also part which would have gone to under the will, to ask a court to preserve her relative ri in the remainder and not transfer the loss from the credi to herself. In this case it is respectfully insisted that si a principle is of peculiar application, because here the cr itors waited from 1860 until after the close of the war. Tl were entitled to urge payment of their debts at any ti and they were entitled to be paid out of the slave prope

and personal estate before resorting to the land. They did not urge payment of their claims. The widow, *under the will,* was bound by its terms and could not do it. The creditors, who *could have urged payment,* stood by with all the hazards against the widow (in their view of the law,) and when the slave property passed away, seek to transfer their claims against what remains, and by this means to exclude the widow from all benefits, either under the will or under the law. *This is not equity.* But it is equity that each shall bear a just proportion of the resulting loss, because neither before had enjoyed or became possessed of the benefit of their rights,and because *as dowress* the widow's right is paramount and preferred, and as widow, under the will, equally favored. The authorities show that if the debts sweep away the legacy given to a widow in lieu of dower, she is entitled to fall back on her dower, because otherwise she would get nothing. This rule grew out of the favorable doctrines adopted for the protection of married women. Now, suppose as in this case, the legacy, or rather a part of it, as well as part of the property applicable to debts, is swept away by the action of the Government or the results of the war, does it change the effect upon the *rights* of creditors to hold that they shall be required to maintain with the widow the same relation to the remainder of the property any more than in the other case, where she is remitted to her dower? In the one case, where the debts would take it all, this effect is prevented by allowing her to fall back on her dower. For example: the estate being $200 and the debts $200. If the widow takes the will, she would in such case get nothing,and the $200 of debts would be fully paid by the $200 of assets. But the widow in such case is remitted to her dower, and it would then follow that she would take the one-third of $200, which is $66.66, and there would be left $133.33 to be applied to the debts. So in the present case, if the principle we urge prevails, the creditors would get the estate less the amount which would be apportionable to the widow, if the

estate is distributed equitably between them. Whereas, if it is rejected, the widow gets nothing and the creditor takes it all.

It would follow that in the one case, from an *established equitable principle in favor of the married woman,* she would be permitted to take dower, because to confine her to the will would be unjust to her, and yet in the other, where her claims *upon the court* are identically the same, she would not be permitted to be kept in the same relation with creditors to the remnant of the estate which she bore to the entire property. It is submitted that the equitable principle in favor of married women requires that under all circumstances the courts should preserve her rights, where in doing so they do not infringe upon any other known principle of law, and that the entire loss should not fall upon her, but should be distributed equitably between herself and the creditors.

WESTCOTT, J., delivered the opinion of the Court.

The methods of assignment and admeasurement of dower, the means by which it was barred, and the remedies for its recovery, as they existed in England at the time of the establishment of the independence of the American Colonies, like the rules of descent, law of primogeniture, and system of entails, were inconsistent with the views of the fathers of the Republic upon these subjects, and but poorly adapted to the wants and requirements of the new society. As there was no place for entails and the law of primogeniture, in a community where a general distribution of property was desired rather than its concentration in the land of an aristocratic class, so in a community where it was desirable that the wife might speedily come into the possession of her dower interests, and the estate be settled, there was no place for the recovery of possession through the tedious process of an assignment under a writ of dower *unde nihil habet,* and

subsequent tedious action of ejectment to recover possession.

Not only was the method of assigning dower, and obtaining possession of the estate so assigned, secured by a more speedy process under these statutes, but other statutes regulating the matter of election between dower and testamentary bequests and devises, both as to the circumstances under which an election was required to be made and the time in which it was to be made, were adopted. These changes, affecting the estate of dower in its various aspects, were contemporary in many of the earlier States with the more elementary changes in the matter of descents, and they constitute but parts of a new system,each several part being so conceived as to make a consistent whole.

At the common law no time was fixed within which an election was to be made. Hence, the determination of this question depended very little upon the space of time which had elapsed after the death of the testator. There was really little safety in winding up an estate. Parties having beneficial interests under the will were delayed, and even when they did get possession the tenure by which it was held was very uncertain, as it might at any time be brought in conflict with a claim for dower, a claim which was paramount to the will, to their claims, to the claims of creditors, which would prevail even against the alienee of the heir, and as to which there was no controlling statute of limitations as in ordinary civil actions. Indeed, so highly favored was the estate of dower at the common law, that it occasioned Lord Bacon's remark that "it was a common by-word in the law that it favored three things—life, liberty, and dower." The statute in this State, which changed the rule of election, is as follows:

"When any person shall die intestate, or shall make his last will and testament, and not therein make any express provision for his wife, by giving and devising unto her such part or parcel of real and personal estate as shall be fully

satisfactory to her,such widow may signify her dissent thereto in the Circuit or Probate Courts of the county wherein she resides (and if there be no court in the county, then to either of said courts in the next adjourning county,) at any time within one year after the probate of such will, and then, and in that case, she shall be entitled to dower in the following manner, to-wit," &c.

Following this section is another, which defines what shall be the interest of the widow in the personalty in testate estates where she dissents, as well as in intestate estates, but its insertion is not material.

This statute may be divided into two parts: First, it defines the extent and nature of the estate of dower, whether the husband dies testate or intestate. Second. In case the husband died testate, and makes express provision for his wife in his will, it fixes a time within which she must dissent thereto, and assert her claim to dower.

While we do not express an opinion as to whether any most minute provision in a will for the wife would be within the meaning and intent of the statute, yet there can be no question in this case that the "provision" is of such character as brings it within the statute. The will directs that the planting interest shall be kept up for seven years for the purpose of paying the debts of the testator, and after payment of debts it directs the whole estate to be divided between the wife and two children, share and share alike.

Independent of the statute, the widow in such a case as this would have been put to an election whether she would accept the provisions of the will or take dower, because the claim of dower is here inconsistent with the will. 6 Am., 24; 2 V. & B., 222; 2 Rop. on Lcg., 414.

The will was admitted to probate on the 14th of May, A. D. 1860, and the widow signified her dissent to its provisions by filing a bill in the Circuit Court of Gadsden county on the 3d day of February, A. D. 1869. Instead of signifying her dissent, therefore, *within one year*, as required

by the statute, she failed to do so until after *nearly nine years* had elapsed. Is she compelled to abide by the provisions of the will through this failure? We cannot better answer this question than by using the language of the Supreme Court of Alabama, where this question arose under a section of their statute precisely similar to the one now under consideration. That court says: "The evil intended to be obviated was the difficulty which previously existed of ascertaining when and how an election was to be made by the widow. According to the course of equity law, the widow was entitled to an account before she was compelled to elect, and a suit in equity was frequently necessary to compel an election. This seems to be the only change made by the statute in the existing law—a fixed and definite term was introduced within which she is compelled to signify her dissent to the will, and if this is not made, it then, if any provision is made inconsistent with her right under the statute, becomes obligatory upon her." 6 Ala., 243. This decision was subsequently commented upon and affirmed in two other cases. 10 Ala., 991; 30 Ala., 331.

This statute of Alabama, passed in 1812, was evidently derived from a statute of North Carolina passed in 1784, and the decisions of the courts of North Carolina upon their statute are upon this question precisely in point. The statute of North Carolina, instead of the words "real *and* personal estate" in our statute, used the words "real *or* personal estate." This statute was considered by the Supreme Court of North Carolina in the case of Craven, vs. Craven, 2 Dev. Eq., 338. In that case Mr. Justice Gaston, speaking for the court, says: "The Legislature by the act of 1784 substitutes a new rule more absolute and universal than that recognized at common law; they made every case of a testamentary disposition by a husband in favor of his wife a case of election, whether the intent that she should take it in lieu of her dower was expressed or not expressed, and whether it could be implied or could not be implied from the structure

and language of the will, and to remove all dispute as to the fact of her election, they declared her to have elected to take under the will unless her refusal so to take was manifested within a prescribed time by a solemn dissent in open court. Unless she dissented, the will regulated the extent of her claims upon the estate of her husband, and if she dissented the law prescribed what should be their extent.

"Justice and the repose of the community require that it should be ascertained as speedily as convenience will permit whether the lands of a deceased man in the hands of his heirs and devisees are or are not subject to dower. The law has defined the time and prescribed the mode when and how this fact can be certainly known. The most obvious considerations of public policy forbid, without the clearest warrant, judicial expositions which will have a tendency to defeat this great purpose of the law." (See also 1 Dev. & Bat. Law Rep., 254; 2 Dev. Eq., 372, 539.) Decisions in Virginia, Kentucky, Massachusetts, Maine and New York announce like principles and rules in the construction of their statutes, but we deem it unnecessary to do more than refer to them in this connection. 4 Kent. Com. 59; 5 Call, 481, 351; 6 Leigh, 36: 4 Leigh, 152; 6 id., 461; 2 Dana, 341; 1 Dana, 203; 12 Pick., 150; 10 Pick., 507; 1 Met., 57, 73; 32 Maine, 132; 5 Paige, 446; 35 Barb., 483; 11 Ohio State, 389.

This period of time having elapsed in this case without dissent filed, and there being such provisions in the will as bring it within the statute, the inchoate right of dower ceased to have any existence and the provisions of the will become obligatory. Neither the executors, the other devisees or legatees, nor the creditors, are in any legal sense under an obligation to give the widow notice of the provisions of the will. The law presumes her knowledge of the will and its contents as well as her knowledge of her right of dower and its nature, and she is bound to know that if she omits for the space of one year to signify her dissent, she cannot claim dower.

The statute gives to the widow this time to inform herself of all the circumstances necessary to the exercise of a judicious and discriminating judgment, and if she neglects thus to do, she cannot be relieved of its consequences, unless her case is brought within that class of cases where a Court of Equity extends its corrective influence on account of fraud, imposition, misrepresentation, or mistake. Recollecting the early enactment of this statute, and that it was but part of a system introducing very elementary and material changes in the nature and extent of other estates at common law, as well as dower, and that it is a remedial statute, we do not well see how this conclusion can be avoided. All of these statutes are remedial in their character. Their enactment originated in the desire and necessity for curing the evils incident to the common law rules upon these subjects and their want of perfect adaptability to the changed civilization and government of the American States. This being such a statute, we must so construe it as to correct the mischiefs which it was enacted to remove.

What were the mischiefs which existed at common law, and at which this statute was aimed? These mischiefs are apparent from the changes made by the statute. These changes were two in number. The first change is in the fundamental rule controlling in the matter of election itself, viz: That no election was necessary, except in a case where there was a plain inconsistency between the will and the dower interest of the wife—in other words, such circumstances as rendered it necessary that the widow would be both taking under the will and against it at the same time, thus conforming our legislative change in the common law to the path indicated in the 9th Sec., 3 and 4 W. 4, c. 105, which was the remedy conceived by Parliament for the mischiefs attending the common law of elections in England. Tom. Law Dic. 585.

The second change is in fixing a time in which the dissent

of the widow to the will shall be made known, and in which he right of election must be exercised, rather than leave her, as she was at common law, restricted to no time, the mischief of the system being that estates were delayed in settlement, that others having interests under the will, as well as the executors and creditors, were never certain as to whether the dower interest of the widow was excluded. Any one at all familiar with the judicial history of England, and of the United States, during the time the doctrine of the common law prevailed upon these two matters, will readily acknowledge the very great mischiefs occasioned by the want of more fixed and certain rules in reference to the matter of election.

The remarks of the Master of the Rolls in Brodie vs. Bury, 2 V. & B., 129, show this great uncertainty. He says: "If it were now necessary to discuss the principles upon which the doctrine of election depends, it might be difficult to reconcile to those principles or to each other, some of the decisions which have taken place on the subject."

In this view our construction constitutes an effectual remedy for these evils. Besides, if this is not the effect of our statute, we are completely at sea when we endeavor to give it a construction conforming to the primary rules which control in the construction of statutes of this nature.

Under this statute, it is impossible that the practice prevailing in a court of equity upon the subject of election can obtain. If the effect of the failure to to dissent *is in law an election to take the will,* that is an end of the matter, because a court of equity, except upon the ground of fraud, or some other like ground, cannot give a construction which will defeat the plain result of the statute. And if the effect of the law is not such an election, it has no effect at all, as the whole matter is left just as it was before.

But let us consider this case briefly in that aspect. What is the doctrine of election? *It is not a rule of positive law, but a rule of practice in equity.* The doctrine originates

thus: Election involves choice—choice involves knowledge, a knowledge both of the facts and of the law applicable to the subjects matter in reference to which the choice is to be made. In the absence of either branch of this knowledge, as to both or either of the two subjects, it cannot as a matter of fact be said that a choice has been made between the two subjects, because the mind has not really acted with reference to the two subjects as to which it should elect, but as to two other subjects which the party believes exist as the subjects in reference to which his election is to be made. A court of equity in such cases will permit the party who has thus acted in ignorance either of rights or facts, and who has thus failed to exercise his right of election, to exercise it when that knowledge is acquired, and will relieve him from an antecedent choice made.

There are cases where the widow, having accepted the provisions of the will, is relieved upon the ground that the property is subject to debts then existing of which she had no knowledge at the time of her choice. Such are some of the cases cited, but they differ materially from this case.

While the rule stated is the general rule of practice, yet other circumstances, besides a knowledge of rights and an accurate knowledge of the comparative values of the two things which are the subjects of election, may be sufficient to bind a person. 1 Ball & Beat. 24. These circumstances arise out of the original intention, acquiesence in the acts of others, the effect of acts of the party having the right of election on the interests of third persons, and the lapse of time. They are so infinitely varied and modified in different cases that no rule applicable to all can be laid down; each must be determined on its particular grounds. 1 McClel., 541. What are the facts here? The will made a bountiful provision. The widow expresses assent to the provisions of the will, accepts the personal property bequeathed to her under the codicil, and acts four or five years in entire harmony with its provisions. During this time she

has frequent conversations with one of the executors as to the condition of the estate, and as to what will probably be her share. These are the acts from which an election may be implied. On the other hand, while the bill fails to make such allegation, the plaintiff, in her testimony, states that she knew nothing about the nature of her dower rights, and that she had never been told of them until the year 1865. At this time the estate had suffered a loss amounting to not less than $150,000 from the emancipation of the slaves. It had become insolvent. Every act of the widow up to the time of this loss manifests acceptance of the will. The election she would now make, if permitted so to do, would not be an election in reference to facts existing at the time she should have made it. It would be an election where the relative values of the two subjects had entirely changed from what they then were. Did a court of equity relieve her, it could not be upon any ground of misapprehension of her rights, or of facts as they existed from 1860 to 1865, but upon a ground of loss, occurring in the natural order of things. In other words, a court of equity is here desired so to act as to establish a principle of insurance against loss from events subsequent to an election.

Under the provisions of the will, the executors were expected to pay the debts of the estate from the income derived from the use of the property. "For the purpose of paying my just debts, I desire my executors to keep my planting interest up for the space of seven years," are the words of the will. A creditor who, for this space of time, awaits the satisfaction of his claim, expecting payment from the income of the estate, and acts in conformity to the will, should not be made to abate his claim on account of a loss, which neither he nor the widow forsaw—a loss, too, attributable to the results of a conflict pending at the time she had the right of election, and before it was exercised.

It is insisted that the act prescribing a time within which the widow was required to file her dissent to the provisions

ıe will was a statute of limitation when considered in ·ence to her dower, and that the act which we have con-:d was suspended by virtue of the act of December 13, which enacts, "That the statutes of limitation now ɔrce in this State, in relation to civil actions of every ription be, and the same are hereby suspended," &c.

he will in this case was admitted to probate on the 14th of May, A. D. 1860. Over one year had elapsed before ıuspending statute was passed, and hence the claim was ɔletely barred before the suspending statute was passed, ıat even if a claim to dower was embraced in our statute ıitations, which is at least a doubtful question, the act of did not affect it, as that act contains a proviso to the t that it shall not be construed so as to prevent any de-ant from pleading said statute or statutes of limitation ıy cause wherein the same shall have run before the pas-of the act.

rt. XV. Sec. 3 of the Constitution of this State provides "all claims of widows which were not barred by the ıtes of this State on the 10th day of January, A. D. 1861, l be considered good and valid for the period of two s from the ratification of this Constitution." This suit brought within two years after this ratification, and it ısisted that the claim of the widow in this case is not ed. Any claim which the widow had to dower in this :e was barred by her own act anterior to this action of convention. The claim for dower was completely ed. It had gone out of existence. We do not think it was the purpose of the convention to revive such a n once destroyed. Its intention was simply to suspend limitation which might exist as to a claim of dower re third persons during that time had held adversely to ıtiff. It was not its purpose or intention to set aside a ntary election made by the persons themselves and give n a right to make a second election under a new state of s. In other words, it was not the intention of the con-

vention to suspend, in all cases, the operation of this statute during that time. It was its purpose to protect a claim for dower against any adverse possession during that time, and not to change the elementary character and nature of the claim for dower. It intended to affect the remedy where a claim for dower existed and had not been abandoned, but not to change the right or recreate a claim for dower which had been abandoned under the statute.

The judgment is reversed, and the case is remanded with directions to enter judgment for the defendants.

DECISIONS

OF THE

Supreme Court of Florida.

JANUARY TERM, 1874.

ALEXANDER McDONALD, ADMINISTRATOR OF SAMUEL WILLIAMS, DECEASED, APPELLANT, VS. D. L. BOGUE, APPELLEE.

died intestate May 1, 1862. M. was appointed administrator and published notice as required by Act of Nov. 20, 1828, concerning Wills, &c., Sec. 39. Within two years after such publication, claims were presented by creditors to an amount more than sufficient to absorb the entire estate, which had been converted into money, and a partial *pro rata* dividend made to those claims. The plaintiff, as heir, claimed the residue of decedent's estate in the hands of the administrator undistributed, insisting that all creditors' claims were barred by the statute of limitations, and January 18, 1871, brought suit against the administrator to recover such residue. *Held*:

That no statute of limitations was in force from Dec. 13, 1861, to the institution of suit.

That in respect to this fund raised from the sale of intestate's estate for the purpose of paying debts, the administrator holds the position of trustee for the creditors, whose claims are, or may be lawfully established, against whom the statute of limitations, in force, does not run so as to deprive them of a *pro rata* distribution of the fund.

Appeal from the Third Judicial Circuit for Madison County.

The opinion of the Court contains a statement of the case.

Patterson & Vann and *D. S. Walker* for Appellant.

Charles R. King and *A. A Knight* for Appellee.

FRASER, J., delivered the opinion of the court.

The plaintiff in this case sues as sole heir and distributee of the estate of Samuel Williams, deceased, to recover from the defendant as administrator the amount of the assets remaining in his hands, as yet undistributed. Samuel Williams, the intestate, died May 1, 1862, and on the 29th of the same month letters of administration were granted the defendant, who immediately caused to be published the notice required by act of November 20, 1828, concerning wills, &c., section 39. Within two years from the date of such publication, claims, amounting in the aggregate to $3,851.57, were duly presented to the administrator for payment, and in the course of administration, a *pro rata* dividend of fifty per centum made thereon by order of the probate court, and that there remains in the hands of the administrator, as found by the referee, $1,231.50, and the estate is insolvent.

This suit was commenced Jan'y 18, 1871. The plaintiff insists that the claims of all the creditors of the estate are barred by the statute of limitations and by force of the act of November 20, 1828, concerning wills, &c., section 39, and upon this ground alone claims the fund in the hands of the administrator.

The court below rendered judgment in favor of the plaintiff for the amount in the hands of the defendant with costs, and from that judgment the defendant appeals to this court and assigns the judgment for error. There are many other errors assigned, which it is unnecessary to notice here, as the decision of the case depends upon the effect to be given to the statutes above mentioned.

It is apparent that the debts against the estate, which were presented to the administrator within the time limited by act of November 20, 1828, section 39, will absorb the whole of the fund in his hands, and that this fund can from the sale of real estate, made purposely for the payme

of those debts and such others as might afterwards be presented, being valid claims upon the fund—such, for example, as claims of persons under the disabilities mentioned in the statute.

The case of Hart vs. Bostwick, 14 Fla. R. p. 172, sets at rest the question of the statute of limitations, as it is in that case held that there was no statute of limitations in force in this State from December 13, 1861, up to the time of the institution of that suit, and upon the ruling in that case, without anything further, the judgment of the court below in this case must be reversed.

But independently of this, and even though a statute of limitations had been in force, and might be pleaded to an action at law, yet it should not be allowed to operate in respect to the creditors entitled to this fund, this fund having been raised from the sale of the intestate's estate for the purpose of paying these claims, and which should be diverted to no other purpose. And in respect to this fund, the administrator holds the position simply of a trustee for the creditors, especially those who presented their claims within the two years, these claims having been admitted and dividend made thereon. Against claims thus situated, the statute of limitations does not run so as to deprive the creditors of a *pro rata* distribution of the fund.

In respect to the rights of creditors who did not present their claims within two years after the publication of notice by the administrator, we intimate no opinion, as they are not necessarily involved in the decision of this case, the claims which were actually presented within the time being so much in excess of the fund in the hands of the administrator.

The judgment of the court below is reversed, and it is ordered that the cause be remitted and that judgment be there entered for the defendant with costs.

WESTCOTT, J.

I concur in the conclusion of the court, but desire to ex press no opinion beyond deciding that there was no statut of limitation in force. No such statute being in force, th estate must be absorbed by the creditors, and the orde directing a payment to the heir is erroneous.

ELIJAH J. BRYAN, APPELLANT, vs. HENRY LONG, APPEL LEE.

A suit in equity cannot be maintained for the purpose of enjoining the levy and sale of personal property under an execution, and for the recovery of damages for the detention, on the ground that the property is exempt from such levy. Ample redress may be had at law.

Appeal from the First Judicial Circuit for Jackson county The opinion of the Court contains a statement of the case

D. L. McKinnon for Appellant.

J. F. McClellan for Appellee.

RANDALL, C. J., delivered the opinion of the Court.

This is an appeal from an order granting an injunction In March, 1872, complainant Long bought a buggy and harness of Bryan and gave therefore a note payable in No vember, signed by complainant and one Harden. The not contained a stipulation that all the property of the maker should be subject to levy and sale to satisfy the debt, waiv ing and relinquishing all benefit of any law exempting the same from levy and sale. Judgment was afterwards entere upon the note, and by virtue of an execution the sheriff

Finlayson, levied upon a horse and the buggy as the property of Long. Long claimed the property as exempt from levy and sale by virtue of the constitution and laws of Florida. Finlayson returned the execution with the levy indorsed, and further returned that he had released the property from levy, it having been claimed as exempt from sale. This was June 23, 1873.

The complainant alleges these facts in his bill, and states further that the sheriff, notwithstanding this release, held possession of the property, and refused to deliver it to complainant until his expenses, incurred in appraising his property, were paid. And that afterwards Bryan applied to the county Judge for an order requiring complainant to appear and answer concerning his property, &c., and that such proceedings were had thereupon that the Judge decided and adjudged that all complainant's property was subject to levy and sale by virtue of the stipulation in said note waiving the benefit of exemption, and that the sheriff is about to sell the property to satisfy the execution, and that meantime the sheriff is using the horse and buggy for his own private purposes, wearing them out and rendering them of little value. Prayer for injunction to restrain the sale, for a return of the property to complainant, for an account to be taken of the value of the property, its use, &c., and that he be paid the same.

In other words, this is an action of replevin brought in the form of a bill of chancery.

The action of the County Court affords no ground of jurisdiction in a court of equity. The whole question both as to the action of the County Court, the duty of the sheriff and the right of the plaintiff, may be determined in an action of replevin for the property or in an action on the case for damages.

Of course we cannot here decide the principal question, as the whole matter belongs to a court of law. The defendant's demurrer to the bill should, upon that ground, have

been sustained. Under our statutes, (Thomp. Dig., 388,) replevin will lie against an officer who levies upon property exempted from levy, and a writ of replevin would perform all the offices of the injunction sought. Moreover, it must be an extraordinary case which warrants the issuing of a writ of injunction to prevent a trespass in regard to personal property.

Were this case properly here, I might feel the same kind of embarrassment which was experienced by a French Judge when a youth, convicted of murdering his own father and mother, appealed for mercy on the ground that he was a poor orphan. Here the complainant admits that he bought Bryan's property on credit, failed to pay for it, and now asks a court of equity to aid him in preventing his creditor from securing his pay out of the very property which the complainant has not paid him for. Such a perversion of fair dealings, however it may be justified under the *sic dixit lex* of our beneficent exemption laws, would not strike a sympathetic chord in a court of conscience.

The order allowing an injunction must be set aside and the cause remanded with directions to dismiss the bill.

CAROLINE MILTON, APPELLANT, VS. WM. H. MILTON, EXECUTOR, &C., APPELLEE.

1. Where the widow is entitled to dower in several tracts of land, she may be allotted dower in one tract equal in value to her interest in the whole.

2. Where such an allotment has been made for several years as to one tract, and other lands are subsequently discovered in which the widow has a right of dower, the first allotment will not be opened at the suit of the widow and against the consent of the executor, in order to have a new allotment under which she is to acquire additional interests in the first tract, as to which she has ceased to have any further right of dower.

3. Under the act providing the method of an assignment of dower, the proceeding is special and summary, in which no relief other than that specially authorized can be granted. If it is desired to call into operation the general powers of a court of equity, the proceeding must be by bill.

Appeal from the Circuit Court, First Judicial Circuit, Jackson County.

A statement of the case is contained in the opinion of the court.

J. F. McClellan for Appellant.

Geo. S. Hawkins for Appellee.

WESTCOTT, J., delivered the opinion of the Court.

In the year A. D. 1866, Caroline Milton, the widow of the late John Milton, filed her petition in the probate court of Jackson county, claiming dower in seventeen hundred and sixty acres of land of her late husband in said county. The court assigned to her four hundred acres of this land as her dower. Since these proceedings, Mrs. Milton has ascertained that she was entitled to dower in other lands of her late husband in the same county. In November, A. D.

1873, she filed this her petition in the Circuit Court, alleging the previous assignment in 1866, the subsequent discovery of the other lands, and stating that at the time she filed her first petition she "was unable with any certainty to set forth the lands of her husband in full." She prays that these subsequently discovered lands may be valued, and that to the extent of the value of her dower interest in them she may be given lands in the seventeen hundred and sixty acres in which she has already received dower, her desire being to have a new admeasurement of dower in the entire estate and an allotment of her entire interest in one parcel or connected body of land.

The executor answered the petition, admitting the claim for dower in the newly discovered lands, objecting to the opening of the first assignment, and insisting that there is no right except as to the lands in which dower has not been assigned.

Upon the petition and answer, the court ordered an assignment of dower in the newly discovered lands and denied the prayer so far as it sought to open the previous assignment.

From this order this appeal is prosecuted. The error assigned is the refusal of the Chancellor to open the previous assignment and to carve out of the seventeen hundred and sixty acres an additional amount of land equal in value to her interest in the lands which subsequently came to her knowledge. The want of knowledge of the existence of her right in the lands discovered after the assignment, at the date of the assignment, is the ground upon which relief is sought in this case. Had the widow known of the existence of these lands at the date of the first assignment, it was no doubt within the power of a Court of Chancery to have allotted in one tract an amount of land equal to her interest in the whole. Can this be done now, against the consent of the executor, is the question presented for our consideration.

It certainly cannot be done by a petition under the sum-

mary method provided by statute for a simple admeasurement of dower, which is the method sought to be made available here. That is a special and summary proceeding, in which no relief other than that specially authorized by the act can be granted. If it is desired to call into operation the general power of a court of equity to open and set aside the former assignment upon the ground of mistake or fraud, the proceeding must be by bill. This is the rule in Alabama, where they have a similar statute. No objection of this kind having been urged, we deem it, however, not improper, in view of the conclusion we reach, to dispose of the question upon its merits. A court of equity is here asked to set aside a judgment of another court having complete jurisdiction both of the subject matter and the parties. The request is made by one of the parties to that judgment; that party was the plaintiff, and the judgment sought to be set aside is a judgment awarding the relief which was prayed for, and this relief was the full measure of her right upon the case made. Under this judgment, she recovered all the dower interest she had in this land, and was placed in possession of it as her several property, with a life estate. All the interest she ever had in the remainder was destroyed, and that remainder became subject to the trusts of the will and the rights of the devisees and creditors, and has so remained for a period of six or seven years.

As against the executor, who is the representative of these trusts and rights, she cannot now have an admeasurement of dower based upon a dower interest in this portion of the land, because at her own request a court of competent jurisdiction has divested her of all interest and she has no estate therein. There was no mistake, such as a court of equity would correct. Within the meaning of the authorities, there was in fact no mistake. There was simple ignorance of a right of dower in additional and other lands. This right of which she was before ignorant can now be enforced without affecting this previous judgment of the court

by an assignment of dower in the newly discovered lands. The Circuit Court could not in this collateral manner set aside the first assignment. No appeal having been prosecuted from the order or judgment assigning dower, it is conclusive between the parties, the widow and the executor. 17 John., 123.

The judgment is affirmed.

BOLYN B. BARCLAY, APPELLANT, VS. JOSEPH T. RUSS, APPELLEE.

Where the consideration of a note is Confederate notes, and it was made during the war, the measure of damages is the value of the notes at the time of the formation of the contract, and not when the note fell due. If the parties at the time fixed their value, that should control. The several decisions upon this subject reviewed and construed.

Appeal from the First Judicial Circuit for Jackson county.

The opinion of the Court contains a statement of the case.

J. F. McClellan, (with whom was *C. C. Yonge,*) for Appellant.

C. C. Yonge for Appellant.

The rule for estimating damages for non-payment of promissory notes, payable in a depreciated currency, seems to be well settled to be the value of the currency at the time of the breach of the contract, to wit, at the maturity of the note. See Sedgwick on Damages, 5th Ed., 269, 270.

It is claimed that in this case the rule is not applicable because of the operation of Ordinance No. 8 of the constitutional convention of 1865, which provides, "That in all

proceedings of Courts of this State founded upon a contract or contracts made and entered into during the late war, between the United States and the Confederate States, the Courts are hereby authorized to admit testimony as to the value of the property or consideration contemplated by the parties to said contracts, and to instruct the jury to find accordingly, provided the defendant shall allege by plea under oath and prove to the satisfaction of the jury, that the currency contemplated in the payment of said contract was Confederate or State Treasury notes, or upon what basis the consideration as to the value of the property, or its use, which was estimated at the time of the formation of said contract."

Two questions are presented for determination. 1st. Does the language employed show any purpose to change the rule of damages above alluded to? 2d. Is the ordinance, No. 8, of the Constitutional Convention of 1865, in force?

1st. The object of the Ordinance was to relieve parties who had given obligations payable in "dollars" during a period of great inflation of a depreciated currency, and to enable them to discharge such obligations by the payment of such sums as the jury should find upon hearing the evidence as to "the value of the property or consideration contemplated." The Court is authorized, not required, to instruct the jury, after hearing the evidence as to the "value of the property or consideration contemplated," "to find accordingly."

We submit that this does not require the jury to find the value of the consideration contemplated at any specific time, either at the date of the contract or at its breach, and being silent on this point, the rule remains as it was before the adoption of the Ordinance, which, as already stated, seems to be at date of the breach of the contract. It is very apparent from the evidence that the jury estimated the damages according to the value of Confederate money at

the date of the breach of the contract, as they were instructe to do by the Court.

2d. Was the Ordinance of 1865 in force at the time? 1st It was not operative, because the convention by which i was adopted was not called into existence in the manne required by the laws and constitution of the State then i force, and the said convention has not been recognized as legal and constitutional body either by the State or th United States, but on the contrary has been ignored b both.

2d. If that convention were a legal and constitutiona body, its duty was to frame organic and fundamental law for the government of the State, and had no authority t enter into the details of legislation as this ordinance mani festly does.

3d. If the said ordinance be regarded as organic in it character, and therefore a proper and appropriate exercis of power by the convention, then it ceased to exist when th constitution of which it was a part was superceded by th constitution of 1868, unless adopted by that constitution and it was not so adopted as we shall presently see.

4th. The 1st section of 15th article of the constitution c 1868 provides, "That all ordinances and resolutions here tofore passed by any convention, and all acts and resolution of the Legislature conflicting or inconsistent with the Con stitution of the United States, and the statutes thereof, an with this constitution, and in derogation of the existence c position of this State as one of the States of the Unite States of America, are hereby declared null and void, an of no effect."

The first sentence of this section would seem to dispose c the whole question by the annulment of the ordinance.— The only question then is, whether the first sentence is in tended to be qualified by what follows.

The punctuation would seem to indicate that it is not in tended to be. The remainder of the section is applicabl

to a certain class of acts and resolutions of the Legislature, to wit, those in conflict with the Constitution of the United States and its statutes, and with the State Constitution of 1868.

The next section of the article is devoted to the remaining class of statutes and resolutions of the Legislature, that are not in conflict with the Constitution of the United States and its laws and the constitution of 1868, and declares them to be in force, but is entirely silent as to the ordinances of conventions, and doubtless for the reason that all these ordinances were already annulled by the first clause of the first section.

But if this view of the subject admits of doubt, then the 25th section of the 16th article of the same constitution declares all notes and other evidences of debt given for Confederate State notes void and that no action shall be maintained thereon.

Now Ordinance No. 8, of 1865, is clearly "conflicting and inconsistent" with the 26th section of article 16th. The one recognizes the validity of such contracts and prescribes rules of evidence to be observed in actions upon them, and the other declares them void, and prohibits the Courts from entertaining action on them.

It is true that the 26th section of article 16th has been declared to be in conflict with the Constitution of the United States in inpairing the obligations of contracts, and to that extent and for that purpose is void. It is not void, however, as a declaration of the sovereign will of the convention, except as its effect and results are limited by the above referred to Provision of the Constitution of the United States, and the will of the conventions thus declared is "conflicting and inconsistent" with the ordinance of the convention of 1865, and therefore annuls it.

The following conclusions seem, then, to be legitimate and reasonable:

1st. That the 8th ordinance of the Constitution of 1865

did not fix the time for estimating damages for breach o contracts for Confederate money, either at the date of th breach, or the date of the contract, and whatever rule pre vailed before that ordinance, remained unchanged.

2d. That the ordinance of 1865 was not in force at th date of the judgment in said case, December, 1873. 1s. Because it was not adopted by a convention having th power and authority so to do. 2d. Because it was expres ly annulled by the first clause of the 1st section of article 1 3d. Because it is conflicting and inconsistent with the 26 section of article 16 of the constitution of 1868, whic though void for some purposes, is not void as the declar tion of the will of the convention, and being in conflict, sa ordinance must be held to be inoperative.

Geo. S. Hawkins for Appellee.

The question for the consideration of the court is, whet the value of the Confederate notes should have been det mined and assessed by the jury at the date of the note, when it became due and payable.

The first of these propositions is assumed with great co dence, inasmuch as there have been two decisions of t court upon the subject, deciding that the value of the C federate money is to be calculated at the date of the n or the time when the contract was entered into. I refer Randall vs. Pettus, 12 Fla., 532; Forcheimer vs. Ho 14 ib. 239.

In the latter case, the court adopts the reasoning a follows the decision of Thorrington vs. Smith in the Supre Court of the United States. 8 Wal., 1. In that case court declare, "We are clearly of opinion that such e dence" (evidence in relation to the value of Confederate c rency,) "must be received in respect to such contracts in der that justice may be done between the parties, and t the party entitled to be paid in these Confederate doll

can recover their actual value at the time and place of the contract in lawful money of the United States."

It is contended that the Ordinance of 1865 as to Confederate currency is not in force now, nor was so at the date of the decisions of this court cited above. Be this as it may, it seems at least to have been temporarily adopted as a fair mode of adjusting the questions as to Confederate money. Randall vs. Pettus, and Forcheimer vs. Holly, certainly decided them irrespective of the ordinance, though cited in both cases. Its equity, in conjunction with the fact of its being a strong expression of legislative opinion, unquestionably commended it strongly to the favorable consideration of the court.

If the ordinance is not in force, then we have no legislation upon the subject, and if the question were *res integra,* the principles as established by the court would still remain, based as they are upon justice and equity, and sustained as they are by the Supreme Court of the United States in Thorrington vs. Smith, and a recent case *in quatuor pedibus* with the one at bar. The moment it is admitted that these Confederate contracts are legal, then the law should govern as in other contracts, and no matter in what light Confederate notes are regarded, whether as choses in action, chattels, or anything else of a personal character, their value can be ascertained only by relation to the time of the creation of the contract—there should be the *restitutio ad integrum*, and regarding Confederate notes merely as property, the party obtaining it should answer for the value it bore at the time of its receipt or delivery.

The moment we depart from the above principles and attempt to subvert the decisions of the court upon this subject, the following argument might arise and be urged with much force, viz: That when a note is payable in *dollars*,(which mean coin or legal currency,) though the consideration was Confederate notes, and the note does not express upon its face that it is to be paid in that currency, is not the payee

of the note entitled to recover its face value in law
Could the written contract be varied by paro
Under these circumstances, to establish a value b
standard than that afforded by the contract itsel
tainly justifies the court in its opinion in For
Holly, when it remarks that "it (the ordinance
destroyed the contract of the parties and made a
So too in 2 Cranch, 10; a case wherein the le
Virginia as to scaling the value of the money o
during the Revolution to its intrinsic value was
Chief Justice Marshall observes, "The legislatu
forming a very extraordinary act. It was interf
mass of contracts entered into between the first
1777, and the last of January, 1782, and ascer
value of these contracts by a rule different from
had been adopted by the parties themselves."

WESTCOTT, J., delivered the opinion of the

Russ, the payee, brings an action of assump
Barclay, one of the makers of the following joint
promisory note:

"$3,300.

"On the first day of January, eighteen hundred
four, we or either of us promise to pay Joseph
bearer, the sum of three thousand three hundred
value received, with eight per cent. interest fr
December 27, 1862.

"JAMES W. McK
"BOLYN B. BA

The defendant pleads, first, *non assumpsit;* s
the note was made during the late war, and th
rency contemplated was Confederate notes; a
illegality of consideration in that these notes of t
erate States were issued in aid of the rebellion.
tiff joined issue on the first and second pleas,

replication to the third. What this replication was it is unnecessary to state, as the determination of the errors here assigned does not involve its consideration.

It was admitted that the consideration of the note was Confederate notes, and the court charged the jury that the measure of damages was the gold value of the consideration at the time the contract was made. To this charge the defendant excepted, insisting that the measure of damages was the value of Confederate notes at the time fixed for payment, or when the note became due.

There was a verdict and judgment for the plaintiff in conformity to these instructions. From this judgment this appeal is prosecuted.

The question presented for our consideration under the pleadings and errors here assigned is, whether the value of the Confederate notes at the time of the execution of the note is not the measure of damages, and not their value at the date the note became due.

It is insisted that this contract is not embraced in the ordinance entitled "An ordinance in reference to contracts made during the late war;" that the note here sued upon was payable in Confederate notes, and that the value of such notes at the time the note became due is the measure of damages, the case being assimilated to the case of a contract payable in the paper of a particular bank or company.

Does the ordinance embrace this case?

The ordinance is as follows:

"Be it ordained, &c., That in all proceedings in the courts of this State founded upon a contract or contracts made and entered into during the late war between the United States and the late Confederate States, the courts are hereby authorized to admit testimony as to the value of the property or consideration contemplated by the parties to said contracts, and to instruct the jury to find accordingly, provided that the defendant shall allege by plea under oath and prove to the satisfaction of the jury that the currency

contemplated in the payment of said contract or contra[illegible] was Confederate or State treasury notes, or upon what ba[illegible] the consideration or the value of the property or its [illegible] which was estimated at the time of the formation of s[illegible] contract."

This note was made during the time embraced in [illegible] h ordinance; defendant admits by his pleadings that it w[illegible] a payable in Confederate notes, and that the considerat[illegible] on was Confederate notes; but it is insisted that the sente[illegible] nce "or upon what basis the consideration or the value of the property or its use which was estimated at the time of the formation of said contract," limits the application of the ordinance to those cases only in which there was an ac[illegible] tual estimate of the value of the consideration at the time the contract was entered into. The effect of these words is not generally restrictive of the whole ordinance. It is an al[illegible] ter- native clause, under which provision is made for a clas[illegible] s of cases in which the consideration was not Confederate n[illegible] otes, but other property, and the effect of the ordinance is to [illegible] per- mit the application of a rule of equity and to reduce the amount agreed to be paid to the acutual value of the [illegible] con- sideration when the basis upon which the value of the [illegible] con- sideration was estimated, or the value of the property wh[illegible] ich was the subject of the contract was determined was [illegible] Con- federate notes; in other words, when the standard of va[illegible] lue in the minds of the parties was Confederate notes.

It was the object of the convention to prevent the rec[illegible] ov- ery of the nominal amount of dollars due in such contr[illegible] acts and to assure the recovery of the actual value of what h[illegible] ad passed between the parties. To prevent on the one h[illegible] and the recovery of the nominal amount of dollars, and on the other to affirm the legality of the consideration in such [illegible] con- tracts, as well as to secure an equitable adjustment by re- turning the value of the notes or property which had [illegible] been parted with. The validity of this ordinance, though [illegible] dis- cussed by one of the counsel, is not presented for our [illegible] con-

sideration by the pleadings or the errors assigned, nor do we regard it as an open question. The interpretation of this particular alternative sentence, couched in to say the least very inacurate language, has never been settled by this court in a case where the consideration was Confederate notes. The positions taken by the appellant are based upon his construction of it, and we cannot say with the respondent that the appeal is frivolous when one of the questions involved is the construction of this alternative sentence in an ordinance of such importance and relating to a class of contracts which are very many in number, as well as varied in nature. This contract being embraced in the ordinance, the measure of damages is the value of the consideration at the time of the "formation" of the contract. This is the rule which this court has already announced in such cases. The case of Fife vs. Turner, 11 Fla., was a case in which a note was given for legal services rendered. The note in that case was given for dollars and the value of the service was fixed in Confederate notes. This court decided that the measure of damages in such a case was *the value of the service rendered,* and that it was not the *value of the Confederate notes promised to be paid,* unless that value was estimated and agreed upon by the parties as the basis of their contract. In other words, that there was no valuation of Confederate notes to be made in such a case, unless the parties themselves estimated their value when making the contract, and made the contract upon the basis of that estimate.

The case of Randall vs. Pettes, 12 Fla., was an action upon two promissory notes. The consideration was Confederate notes, as in this case. The rule applied in the Circuit Court was their value at the date of the note. This ruling was made the subject of exception. The question was brought to this court, and we there determined that this rule was correct. In principle there is no difference between that case and this.

The judgment is affirmed.

MICHAEL FITZPATRICK, APPELLANT, VS. WILLIAM H. TURNER, APPELLEE.

The period of two years from the rendition of judgment is allowed for taking an appeal. This period having elapsed without appeal, a party cannot regain his lost opportunity by an appeal from an unfavorable decision of a motion to set aside the judgment for irregularity.

Appeal from the Circuit Court, Fourth Judicial Circuit, Nassau County.

A statement of the case is contained in the opinion of court.

John Friend for Appellant.

Liberty Billings for Appellee.

FRASER, J., delivered the opinion of the Court.

This is a proceeding for the foreclosure of a mortgage commenced August 31, 1870, and was filed October 3, 1870, and the cause set down for trial at the fall term of the same year, November 9, 1870. Notice by defendant's attorney to plaintiff was served and filed in the cause, setting forth that the attorney withdrew the answer of the defendant, and no longer represented the defendant in the cause. November 10, 1870, the court rendered judgment by default against the defendant for want of an answer, and ordered the clerk to assess the damages, which having been done, and judgment entered for the amount of the mortgage money, with costs, execution issued thereon November 30, 1870. After the issuing of the execution, the defendant having employed other counsel, made an affidavit setting forth the grounds of his defence to the plaintiff's action, alleging irregularity of the proceedings prior to the judgment, and that execution had illegally issued. This affidavit was served on the sheriff

having the execution, December 27, 1870. The sheriff thereupon returned the execution and affidavit to court in pursuance of the provision of section 2, act of February 15, 1834, concerning executions. With the exception of notices of trial, served from term to term by defendant's attorney, nothing further appears to have been done, nor any motion, or application made in the cause, until April 22, 1873, when the following order was made by the court:

"Motion to stay execution and to set aside the judgment of foreclosure overruled, April 22, 1873."

From this order the defendant appeals to this court, and assigns for error the denial of his motion to set aside the judgment. The judgment of the court below in this cause having been rendered on the 10th November, 1870, the defendant had two years from that time to take his appeal. Instead of adopting this course, he chose to attack the legality of the execution, and assert his rights in that form. If he has mistaken his remedy, it is now too late for this court to afford him relief. The reversal of the order of April 22, 1873, would operate simply to give the defendant all the advantage that he could possibly have derived from an appeal from the judgment within the time limited by the statute. But what he cannot attain directly he will not be allowed to do indirectly, and there being no illegality in the execution, it having issued upon a judgment duly entered of record, and the time for appeal having passed, the defendant's remedy is not in this form.

The order of the court below is affirmed, with costs, and the case remitted for further proceedings according to law.

WESTCOTT, J.

As I understand the record in this case, it does not present for our consideration any motion to open the default or set aside the judgment. It is true that something is said in the affidavit of illegality about setting aside the judgment, but no such motion is in the record, and the

affidavit of illegality is the proper foundation for the stay of execution and the trial of its legality when returned to the court, and of that only. I agree to the affirmance of the judgment of the court below for the reason that the affidavit sets forth no illegality in the execution. What is stated has little to do with this question, but enters into the merits of the judgment, rather than the illegality of the execution issued thereon.

JACKSON SHARP CO., RESPONDENT, VS. DANIEL P. HOLLAND, APPELLANT.

1. An answer alleging that defendant has no knowledge or information sufficient to form a belief as to a material fact set up in the complaint, constitutes an issue under the Code.

2. Under a judicial sale of personal property in the possession of a defendant in execution under a contract of purchase, the vendor having retained the title, and the defendant having made partial payment, the plaintiff in execution crediting his bid upon the execution acquires such interest only as the defendant in execution had.

3. Where it appears from defendant's pleadings that the vendee in the original contract to sell has done such acts as estop him from denying the corporate character of the vendor, then the purchaser at such judicial sale is likewise estopped from denying it, and a defense putting the corporate character in issue is frivolous.

4. Where it appears from the defendant's pleadings and the written contract of purchase on file that the corporate character of the vendor was admitted by the vendee, and the purchaser at the judicial sale in his answer admits negotiations by vendee with vendor as a corporation, and upon a motion to strike out a defense denying the corporate existence as sham, no affidavit is made of the truth of the answer, such defense should be stricken out as sham.

5. Where there is apparently a meritorious defense pleaded with such uncertainty that its precise and full nature is not shown to the Court,

it should not be stricken out as sham or frivolous. The plaintiff's remedy is by motion to require the pleadings to be made definite and certain by amendment.

Appeal from the Circuit Court, Fourth Judicial Circuit, Duval County.

A statement of the case is contained in the opinion of the Court.

Papy & Raney for Appellant.

H. Bisbee, Jr., for Respondent.

WESTCOTT, J., delivered the opinion of the court.

This is a case under the Code. The answer of the defendant, Daniel P. Holland, was stricken out as sham and frivolous, and final judgment awarded for plaintiff. The complaint is filed against this defendant, Holland, and the Jacksonville, Pensacola and Mobile railroad company. In the first subdivision of the complaint, plaintiff alleges itself to be a corporation created and existing under the laws of the State of Delaware, and that it is engaged at Wilmington, Delaware, in the business of manufacturing and building railroad cars and engines. The defendant, the Jacksonville, Pensacola and Mobile railroad company makes no answer, and the defendant, D. P. Holland, answers that as to the truth of the plaintiff's allegation that it is a corporation, created and existing under the laws of the State of Delaware, he has no personal knowledge or information thereof sufficient to form a belief, his only information on the subject being derived from the complaint of the plaintiff. The defendant insists that his answer puts the corporate existence of the plaintiff in issue, that it is necessary for the corporation to prove its corporate existence when put in issue, that this is a material fact denied by the answer, and that such an answer is not either sham or frivolous. It is true that an answer alleging that defendant has no knowledge or infor-

mation sufficient to form a belief as to a material fact set up in the complaint, constitutes, under the Code, an issue, but in this case the defendant is estopped from making such denial when the corporation existence is alleged, nor is such an allegation necessary.

The appellant admits in his answer that all of his interest in the subject of the controversy arises as stated in the complaint by purchase at a judicial sale of the property of the Jacksonville, Pensacola and Mobile railroad company, under an execution in favor of himself against this company. That he paid no present value or consideration for the cars, but simply credited the amount of his bid upon the execution. The subject of the action, two cars, the complaint alleges were in January, 1872, delivered into the possession of F. H. Flagg and C. L. Chase, lessees of the road, from the Jacksonville, Pensacola and Mobile railroad company in trust *not to deliver* the cars to the Jacksonville, Pensacola and Mobile railroad company until the Jackson Sharp Company should be paid for them. That after the termination of this lease, the Jacksonville, Pensacola and Mobile railroad company came into possession of the cars, to-wit: on the 26th of May, A. D. 1873, and that it was distinctly understod and agreed when the cars were delivered to said Chase and Flagg, that the title in said cars should not vest in the said railroad company until the entire purchase price had been paid to plaintiff. These cars with the other property of the road were delivered after the sale into the possession of the defendant, Holland.

The answer does not deny these facts, but sets up a want of information, and that he had no notice, either actual or constructive, of such understanding and agreement. Under these circumstances, Holland acquired no right to the cars as against the plaintiff in whom the title was. 8 Met. 41; 1 Burr., 20; 5 B. & Ald., 826; 5 Gray, 307; 6 Bin., 2.

Before the motion to strike out the answer as sham and frivolous was made, a copy of a contract between the Jack-

sonville, Pensacola and Mobile railroad company was filed, in which this agreement is recited. This contract was based upon the mutual knowledge of the incorporation of the two companies. The Jacksonville, Pensacola and Mobile railroad company having dealt with the Jackson Sharp Company as a corporation, is estopped from denying its corporate existence. In this case the Jacksonville, Pensacola and Mobile railroad company files no answer and makes no defence. The Jacksonville, Pensacola and Mobile railroad company having admitted the corporate existence of the Jackson Sharp Company in its dealings with it (and such dealings are alleged and not denied)—would be estopped from denying its corporate existence. Wait's Code, 204; 9 Abb., 168; 17 How., 487; 27 Barb., 636. In such a case the complaint need not allege facts sufficient to show the incorporation. The interest acquired under the judicial sale by Holland was only such interest as was possessed by the Jacksonville, Pensacola and Mobile railroad company. This corporation was estopped from denying the corporate existence of the Jackson Sharp Company, and we think the purchaser of its interest stands in precisely the same relation as this corporation did in this respect. Under these circumstances it is no defence to say that there was no such incorporation; it is without the least merit and frivolous. The allegation in the complaint of the corporate existence is made on actual knowledge, and is supported by affidavit. The contract between the two corporations was on file when the motion to strike out was made. In it the plaintiff's corporate existence was admitted. In the fifth subdivision of the answer of the defendant, dealings with the plaintiff by the Jacksonville, Pensacola and Mobile railroad company, and with Chase and Flagg, are mentioned and admitted. When the motion to strike out is made, the defendant makes no counter affidavits. While there are thirteen subdivisions or sections to this answer, this and another which we subsequently consider are the only ones in respect to which there can

even be a question as to their being either frivolous or sh
No attempt has been made in argument to sustain them.
whole defence indicates an entire want of merit. Look
at the whole case, and especially in view of the fact that
defendant makes no response to the motion by affidavit,
think this defence might very properly have been strick
out as sham. It was destitute of merit and was frivolo
The court under the circumstances was also obliged to c
clude that it was untrue, and it was tl.erefore sham.
N. Y., 344.

The only other defence stricken out by the court, as which defendant insists there is error, is as follows: Aft alleging the existence of an account between the Jacks Sharp Company and the Jacksonville, Pensacola and Mobi railroad company, and Chase and Flagg, the defendant a leges "that as to the purchase of said cars, and the amount paid and received therefor, he has no personal knowledge, but has been informed since the commencement of this action and believes the fact to be that the said Chase and Flagg claimed to have paid to the plaintiff twelve thousand dollars on account of said purchase, and that since the death of said Flagg and alleged abandonment of the trust by the said Chase, the account of the plaintiff with the Jacksonville, Pensacola and Mobile railroad company *has been improperly altered,* and credits formerly entered by the plaintiff to the car sale have been changed, and the amount passed to the credit of another person. Defendant further says that for aught he knows, the said Chase and Flagg may have made some payment on said cars, and the said J. C. Greeley may have made some payment thereon, but how made and at what time made, this defendant has no means of knowing and cannot answer, nor does he know, nor has he been informed whether anything has been paid since the month of April, 1872, but this defendant has been informed as hereinbefore alleged that credits given by the plaintiff in the said car account have been improperly changed and

passed to the credit of another account, and this defendant believes and so charges that upon a fair and just settlement with the said railroad company, the amount claimed by the plaintiff would be very materially diminished.

It was entirely within the power and right of the plaintiff and the Jacksonville, Pensacola and Mobile railroad company to transfer and change the credits on this account as they saw proper, during a long time in which the defendant, Holland, was nothing more than a general creditor. This allegation, however, is here connected with the allegation of *improper alteration,* and also with *a general charge upon belief, that upon a fair and proper settlement the amount claimed would be materially diminished.*

We cannot say within the meaning of the authorities that the answer is here sham or frivolous. The allegations here are so indefinite and uncertain that the precise nature of the defense is not apparent. This is the precise character of this defense, and there is a provision of the Code expressly applicable to it. Section 110 of the Code provides that, "When the allegations of a pleading are so indefinite or uncertain that the precise nature of the charge or defense is not apparent, the court may require the pleadings to be made definite and certain by amendment." See also citations in Voorhees' Code, 247. The court should not have stricken out this defense as frivolous or sham, but upon motion should have required the pleadings to be made more definite and certain.

We dislike very much to interfere with the exercise of power upon the part of the court in a case apparently so destitute of merit as this is, but striking out defenses as being sham and frivolous is a very summary and delicate proceeding. Great care should be used in the exercise of this power. There is nothing from which we can say this defense is apparently false, and it is therefore not sham. We are not sure that the defendant is not entitled to an abate-

ment of the sum sought to be recovered. He charges expressly that upon a fair settlement the amount claimed would be materially diminished. This is certainly very indefinite and uncertain. It is bad pleading, but we cannot say it is frivolous.

The order striking out this defense as frivolous was erroneous, and for this reason the judgment is reversed and the case is remanded for further proceedings.

JAMES J. HOLLAND, APPELLANT, VS. THOMAS O. HOLMES APPELLEE.

1. In every contract for the sale of lands, whatever may be the language in which it is couched, there is an implied undertaking to make a good title, unless such an obligation is expressly excluded by the terms of the agreement.

2. An offer to make a quit-claim deed, which conveys only vendor's interest, is not a compliance with an agreement to make title in a case where the chain of title upon the public records is defective and broken.

3. Where the judgment of the Court below is based upon the findings of a referee, an appeal brings these findings to this Court for review. They are to be treated here as the verdict of a jury, and unless they are against the evidence, this Court will not interfere. Where there are conflicts, the credibility of the witnesses will be left to the referee.

Appeal from the Circuit Court, Fourth Judicial Circuit, Duval County.

The opinion of the court contains a statement of the case.

H. Bisbee, Jr., for Appellant.

Call & Basnett, for Appellee.

WESTCOTT, J., delivered the opinion of the court.

This is an appeal from a judgment rendered in an action upon the case brought by Holland to recover of Holmes damages occasioned by alleged fraud and deceit upon the part of Holmes, in the matter of a sale to Holland of a house and lot in the city of Jacksonville, and for damages occasioned by the failure on the part of Holmes to perform his agreement of sale.

The referee found from the evidence as matter of fact, that the whole subject of this suit had been made a matter of negotiation and settlement by the parties, and that any and all damages resulting from the breach of the contract, or from the representation by the vendor that he had a good title, had been embraced in the settlement. With this finding of fact, the necessary conclusion of law was that the plaintiff's right of action had been destroyed by such settlement. Plaintiff excepted, and here insists that what transpired was a sale of property by Holland to Holmes; that it was no settlement; that his right of action for the deceit and his consequent damages were not mentioned; that he had a right to recover damages occasioned by the assurance of Holmes that he had a good title; that such representation was a false and fraudulent representation, and that he has done nothing by which his right of action or consequent damages have been compromised, adjusted or settled.

The first question which arises is, what is the effect to be given to the findings of the referee as to matters of fact in a case of this kind, where the judgment of the court is entered upon such findings, and the appeal is prosecuted from such judgment.

Under the Code these findings must be reviewed in like manner and with like effect in all respects as in cases of appeal where the trial has been by the court, and findings of fact by the court are sought to be reviewed. Sec. 218, 214, Code. What is the rule as to conclusions of fact found by

the court when a review is sought here? Such "findings of fact are deemed conclusive unless they are without evidence in support of them or against an overwhelming weight of evidence." Voor. Code, 398, sec. 268. They should not be set aside as against the weight of evidence, unless the preponderance be so great that the verdict of a jury to the same effect on the same testimony would be set aside. How. Code, 410, 422, 423; 1 Sand., 457.

There can be no doubt that upon an appeal from a judgment of the Circuit Court, based upon the findings of a referee, his findings of fact may be reviewed in this court, although a different rule obtains in the Court of Appeals in New York.

We think the correct rule is that the findings of fact by a referee must be treated as the verdict of a jury in like cases. The referee found in this case that there was an adjustment and setlement of the matter embraced in this suit. Upon a careful examination of the testimony, is the finding of the referee upon this quection so plainly against the evidence that the judgment must be reversed and a new trial awarded? This is the general question presented by this record. This action arises from a breach of the following agreement:

JACKSONVILLE, FLORIDA, March 24, 1866.

$1,010

I have this day agreed to sell to J. J. Holland the house and lot in the town of Jacksonville, Florida, known as lot number six in square number forty-nine, for the sum of ten hundred and ten dollars, the title to be delivered so soon as the full amount shall be paid by said Holland. The said Holland to have occupation of the premises at the same rent of the present tenant, say twelve dollars per month, until full payment and titles are perfected in him, and for all money payments on the premises shall be entitled to a proportionate reduction of the rent that the payments bear to the value of the premises as stated above in the agreement of sale.

T. O. HOLMES.

Under this agreement Holland entered into possession. He made all the payments agreed to be made, and was clearly entitled to a performance by Holmes. He also made improvements of considerable value. He alleges that Holmes falsely and fraudulently represented that he, Holmes, had a good title. Holland was entitled to a good title under this agreement. The legal effect of this agreement was that the land should be conveyed by one having a good title, or full power to convey a good title. 1 Black. S. C., 455. In every contract for the sale of lands, whatever may be the language in which it is couched, there is an implied undertaking to make a good title, unless such an obligation is expressly excluded by the terms of the agreement. 25 N. Y., (5 Seld.) 543.

From the evidence it appears that the chain of title of the vendor here was not complete upon the public records. He claimed that he had lost one of the deeds and introduced witnesses endeavoring to establish its existence. He also claimed that his possession and that of those through whom he claimed was of such duration and of such nature as afforded good ground for him to believe that his title was good, and always asserted and now asserts that it is good. While there is a conflict in the authorities upon the general subject of the form of the conveyance which a party is entitled to under such a contract, (Hilliard on Vendors, 208 to 270,) yet the vendee, if he was willing to take any conveyance at all, here was entitled to something more than a simple quit claim deed, which was all that the vendor offered. 22 Conn., 513; 8 Eng., (Ark.) 422. The vendor had agreed to sell the land, to give a good title and not to execute a deed of whatever interest or title he had in it.

It is clear, therefore, that the vendor by his refusal to execute any other deed than a quit claim deed, violated his contract. It is also true, that if the vendor had no title and falsely and fraudulently represented that he had a good title as the vendee alleges, that he, the vendor, was liable to the

vendee in this action for fraud and deceit. The vendee could not have recovered the price paid for the land and the value of his improvements, and at the same time have a right to retain possession, with probability that he might never have been evicted. Without proposing to announce any rule as to the measure of damages in a case of eviction where there has been fraudulent representations as to title, and only for the purpose of considering the finding of the referee, it may be admitted that the damages would have embraced the value of the improvements and other consequent damages. This brief view of the rights of the parties under this contract will enable us to understand the effect and scope of their subsequent acts in reference to the transaction from which it is claimed resulted a settlement of the whole matter of difference between them.

Holland, in ignorance of the character of the deed which he took, accepted from Holmes a simple quit claim deed unaccompanied by a relinquishment of dower. When he wished to have it recorded, he was informed that it was not a good deed and he was subsequently apprised by counsel that in his opinion there was a fatal and serious defect in the chain of title, so far as it appeared in the clerk's office of the county.

Holland having discovered this defect in the chain of title, and being advised that the quit claim deed was not such a deed as he was entitled to, sought legal advice as to his rights and caused the following letter to be written to Holmes:

JACKSONVILLE, FLORIDA, June 24, 1870 —

Mr. THOS. O. HOLMES,

Dear Sir—It is necessary something immediate and definite should be done with regard to the title to the property sold by you to Mr. J. J. Holland. We have examined the matter more fully and advise him, in view of the complications surrounding the title, and your indisposition to warrant the title, to propose to surrender the lot to you in the

ie condition in which he took possession of it on your ing him the purchase money and legal interest on it to e. If you do not accept this proposition or give Mr. Hol- l a warranty of the title on which he can recover if ejec- we shall be forced to file a bill against you this week.

Very truly, yours,

FLEMING & DANIEL, Att'ys, &c.

This letter was the commencement of the negotiation ch ended finally in the alleged full settlement. The dee alleges that what finally happened was nothing more n *a sale* by him of his interest. This letter did not result n any proposition to buy or sell the interest of the ven- . It was a statement of what he was willing to do in v of the "complications surrounding the title," and "the dor's indisposition to warrant the title." It was a state- it proposed to have been made after full examination by attorneys. The terms complications surrounding the e, the matter of a warranty title, the improvements on lot, and the purchase money, embrace the general sub- s-matter which are the foundation of this suit. It is from se very things that the difference arises, and out of which alleged damage arises. This letter is the beginning of negotations which followed.

The questions present themselves, was it a desire on the t of Holmes to purchase this property of Holland which asioned this letter? Was it for the simple purpose of ing this property that Mr. Holland wrote it? It is plain t this was no proposition of a simple sale or purchase. lland had paid a certain amount for the land and had lt improvements. He here proposed to take what he had d for the land, and after removing his improvements to tore the land as he found it to Holmes. This proposition s made by Holland upon the hypothesis that in any set- ment he made with Holmes, he was entitled to the price paid for the land and was also entitled to his improve- nts. In other words, to deal with him upon the hypothe-

sis that his title, whether good or bad, in fact was to *viewed as good in any negotiation looking to a settlem with him.* Holland, when he thought he was getting a g title, valued the lot at ten hundred and ten dollars, and sum he now demanded. He further demanded the right remove his improvements, and he was to do nothing m than give up the lot in the same condition that he found To sum up the whole matter the proposition was thus: have agreed to buy this property; I have paid for it. Y agreed to sell and give me a warranty deed. You refuse give me a warranty deed. You say the title you have good, and that a quit claim deed which conveys your int est is a good title. I do not think you have a good ti and in view of the complications surrounding the title a your indisposition to warrant the title, I propose that y return me what I paid you, which was what I thought land was worth with a good title and permit me to take improvements I built, and I will restore you what I receive the lot. Holmes accepted the proposition but Holla withdrew it.

The next important thing which occurred which has bearing upon the alleged final settlement of the whole su ject-matter of difference between the parties, was at an i terview in the office of Messrs. Fleming & Daniel, attorne for Holland. At this interview a proposition was ma looking to the purchase of one house on the south part the lot by Holmes, and the surrender of the whole lot. was agreed that Holmes was to give twenty-eight hundre dollars for the whole lot and the one house on the south par and Holland was to pay ten dollars ground rent for th north part. Holmes accepted the offer and a day or so afte wards tendered the money. Messrs. Fleming & Daniel, t whom the tender was made, replied that Mr. Holland d clined to fulfil the agreement and that they had withdraw from his case. Mr. Daniel, one of the attorneys of Mr. Ho land, makes this statement in his testimony in reference t

this negotiation: He says, when the conference was had relative to the twenty-eight hundred dollars to be paid by Mr. Holmes, I don't think that we *then* had any instructions from Mr. Holland to turn over to Mr. Holmes the agreement for sale except upon the consummation of the contract for twenty-eight hundred dollars. *My memory is that upon the consummation of this contract, there was to be a delivery of the papers.* Here again, we have negotiation as to the whole subject-matter. This witness also states that Holmes asserted several times in this interview that he thought he was paying more than the property was worth. There were several interviews between the parties after this. No other person was present. The only testimony relating to these interviews and to the alleged settlement is that of the parties. It was as follows. The plaintiff testified as follows in reference to these interviews:

"The subject of the settlement of right of action for damages was never mentioned between myself and Mr. Holmes at any time. I agreed to quit claim what right I had in the property under the contract; Mr. Biggs did not state to me that the heirs of Mary Darby had made a deed to him, Biggs. As to the contract being delivered up to Mr. Holmes, there was nothing said; I left it with other papers in the hands of Mr. Graybill, the clerk of Fleming & Daniel, who had the other papers. I did not instruct Fleming & Daniel to deliver the contract to Mr. Holmes. I do not remember delivering the contract to Mr. Holmes. The contents of the letter of Fleming & Daniel to Holmes were known to me. I saw Mr. Holmes twice across the river in relation to the place. *Various things on different subjects were said. I went over to see him to settle with him on the best terms I could, being in his power, reserving my right as per advice to sue him for damages. So much transpired I cannot tell all that took place. I cannot tell what particularly I said.* I made the proposition as stated, to convey back my interest in the property to Mr. Holmes on

the best terms I could make with him. I accepted forty-five hundred dollars from Mr. Holmes, less the discount on his notes, for my interest and right in the premises as held under the contract. Damages and injuries were never mentioned between us. As to the contract being delivered up to Mr. Holmes there was nothing said. I left it with other papers in the hands of Mr. Graybill, the clerk of Fleming & Daniel, who had the other papers. I did not instruct Fleming & Daniel to deliver the contract to Mr. Holmes. I do not remember delivering the contract to Mr. Holmes."

The defendant testified thus: "Between the date of the abandonment of this last proposition by Mr. Holland and the 27th of July, 1870, Mr. Holland came to my house several times and importuned me to purchase the whole property. That it was difficult to remove the houses and settle the matter. I declined any other than the contract made with him; that I did not want the houses; that I had sold to get rid of all these tenant houses. His price had always been from the beginning up to this time five thousand dollars for the whole property. The last time that he came we agreed upon an absolute and unconditional sale of the premises for forty-five hundred dollars,he stating that he would return my deed that was unrecorded,my contract of sale and all the papers in reference thereto, stating at the same time that the title was perfectly good in me, but from the want of the connecting link in the records he could not raise money upon it, which was his reason for selling me the whole property, including the insurance and everything connected with it, and he gave me a quit claim for himself and wife. This was upon the other side of the river. It was a final settlement and afterwards consummated according to agreement, and all the papers relinquished to me—my unrecorded deed, the leases, the insurance policies, contract of sale, and a quit claim deed made by him and his wife to me. I have paid the forty-five hundred dollars. It was a verbal contract. It was an unconditional settlement of the whole matter between

us in regard to lot 6, block 49. I said to Mr. Holland that it was more than the value of the property. I showed him a house that we were standing in front of, that was a great deal better than his houses, that I put up, and cost less money, and that if it was not for the trouble about this matter, that I would not give it for them. That but for this trouble I would not purchase at all at any price; that I did not want dwelling houses in Jacksonville, that I had been bothered with them for years which was my reason for selling them out. I don't remember that there was anything said about titles to this lot at the time of the agreement, except as to the claim of Mrs. Moody. I made him an offer to loan him money on his title at the same rate as Mr. Oakes would loan it, as I believe it was good; he had said something about Mr. Oakes not wanting to loan money on that title that he had. Mr. Biggs, the party from whom he, (Holmes,) obtained title, had been in possession of the property many years prior to the war, I think in 1855 or '56, and may have been earlier. No one asserted any claim to the property during my possession from 1858 or '59, as against the title of Mr. Biggs, I believe that Mr. Biggs had perfected the title from him. I do not remember positively. Upon paymont of the forty-five hundred dollars to Mr. Holland, I received the deed I had given him, the original contract of sale, a deed from him and his wife, insurance policies, for which an additional sum was paid, the lease of Norton, the Remington deed and Moody assignment. Mr. Holland delivered the agreement. He and his agent, Mr. DaCosta, were sitting by, I think. I took it from his hand when he brought it. I asked for it particularly; Mr. Holland went out to get it. There was nothing said by either me or him at that time when the papers were delivered as to releasing any right of action for breach of contract. I went there merely to pay the money and receive the papers according to our final contract and settlement over the river, and the papers were returned to me as he had agreed to do."

"*Question*—Was there anything said previous to that time about releasing plaintiff's right of action for damages?

"*Answer*—Not in that language, but it was said in substance that I was to have it absolutely and unconditionally. I swear to it positively. *Nothing was said in that language as to settling any damages; the purport of it was that it was to be a final settlement of the whole matter.* I cannot say whether the right of action for damages was mentioned in these words. We discussed the whole matter the last time he was over the river, and we settled the whole matter; there were no reservations.

"*Question*—Did you or not testify on both of the former trials of this case that the subject of the right of action for damages for breach of contract was never mentioned between plaintiff and defendant?

"*Answer*—I cannot remember, but I did not intend to say that the substance or subject of the question of damages was not settled in our final settlement.

"*Question*—Was the subject of the right of action for damages discussed at all by you and Mr. Holland?

"*Answer*—The word damages or right of action, was not mentioned, but in various ways in substance it was; all injuries were included. I don't think Mr. Holland used the word injuries, but he spoke of being injured, all these matters were discussed. I never asked Mr. Holland to release rights of action for damages in these words. He proposed himself to make a final matter to end the matter in the sale of the whole property. I cannot recollect his exact words; that was the substance as I have stated it in various conversations and our understanding and his, that it was a finality of the whole matter. In my conversations with Mr. Daniel I don't remember that the question of damages for breach of contract was spoken of, unless it is in that letter. There was nothing said about rights of action for damages when the $2,800 negotiation took place; the subject of the conversation was that it was to be a finality of the whole matter.

this was the impression given me both by Col. Daniel and Mr. Holland. I stated to them that I was giving them three hundred dollars more than its value, to close the whole matter, to have an end to it, or close the whole matters, that is the meaning of it."

What is the result of this testimony? The plaintiff says upon the direct examination that the subject of the settlement of the right of action for damages was never mentioned by him and defendant at any time, and that he agreed to quit claim his interest in the property. The defendant admits that the words, "the right of action for damages," were never used,and he also states that one part of the understanding was,that plaintiff was to give him a quit claim deed. As to delivery of the contract and the agreement in respect to it, there is a direct conflict. Upon the cross examination, plaintiff,when asked to tell all that was said said and done,replied that *"various things on different subjects were said. I went over to see him to settle with him on the best terms I could, being in his power, reserving my right as per advice to sue him for damages."* The witness cannot mean by this that he made any express statement to Holmes to this effect, for both himself and Holmes testify that such words were not used by them. His obvious meaning is that he was silent on the precise subject of the right of action for damages. He continues, *"so much transpired I cannot tell all that took place. I cannot tell particularly what I said.* Damages and injuries were never mentioned between us." There is no necessary conflict here, as the defendant testifies that he does not recollect the use of the word "injuries." These are all the necessary conflicts in this testimony. The plaintiff admits that *so much transpired that he could not tell what took place; that various things on different subjects took place, and that his purpose in going over to see defendant was to settle with him on the best terms he could;* adding that he reserved his right to sue for damages, but this reservation it is apparent was by silence. The defendant gives

a general statement of the subject discussed and says "the understanding of both of the parties was that this was a final settlement of the whole matter. If it be admitted that there was something more than a simple breach of contract here, and that the circumstances would have entitled the plaintiff to have sought a court of equity to rescind the contract, and that he might have recovered the purchase money with the value of improvements, we see that both of these elements necessarily entered into this settlement. We thus see that the damages resulting from the breach of the contract and the alleged fraudulent representations, to-wit: the purchase money and the improvements, were matters necessarily embraced in this settlement, and it is immaterial whether the word "damages" or the words "right of action," were used or not; the settlement embraced them to this extent at all events. That Holland did not in this transaction get all of the damages which he might have recovered in an action at law, cannot justify the setting aside of a settlement of the whole subject-matter and difference between the parties. The referee found his facts in accordance with the testimony of Holmes, and the natural conclusion which followed from all of the transactions between the parties.

Two persons who were jurors in a former trial were introduced to impeach the testimony of Holmes. They were asked "whether he did not then testify that the subject of right of action for damages for breach of contract was never mentioned between plaintiff and defendant." They replied, "He did say they were not mentioned, but he said when he paid the money to Mr. Holland he supposed it was a full settlement." This is what Holmes now testifies substantially.

It was also attempted to impeach Holmes' testimony by proving that he had made a statement to the witness Daniel that was untrue. This witness testifies that Holmes in one of his negotiations with him as the attorney of Holland, said that "he had given a quit claim deed, and that was the kind

ed he always gave, and that he considered it sufficient." records of the clerk's office show that he as a general gave warranty deeds. This is not the proper method npeaching this witness. He should have been asked her he ever made such a statement. He would then had an opportunity of making an explanation under of his statement not under oath. If, however, Holmes been asked this question and had testified that he made ich statement, it would have raised a question of credi-, which the referee is the proper party to settle. These esses are before him, he sees them; this court has uni-lly refused to decide questions of credibility.

iking an impartial and fair view of the whole testimony, annot say that the finding of the referee was against the ence.

dgment affirmed.

UEL A. SPENCER, APPELLANT, VS. SARAH F. MCBRIDE, APPELLEE.

tatu es upon the same subject matter must be construed together. A atute repealing another statute on the same subject, and prescribing new rule, is designed to remedy the evils consequent upon the en-tment of the statute which it repeals, and where the nature of the vil to be remedied and the remedy conceived by the Legislature are ain, the statute must be so construed as to advance the remedy and press the evil.

Under the first and tenth sections of the act of February 27, 1872, the egislature prescribed a limitation to an action upon a promissory ote of five years from the date of the accrual of the action. Under ne 19th section, "all actions not heretofore barred by statute" were xcepted from the operation of the limitation until six months after s approval. The words "not heretofore barred by statute" con-

strued. The effect of the enactment was to fix a limitation of six months in such cases.

3. Where a statute of limitations prescribes the time within which a suit shall be brought, and a part of the time has elapsed, effect may be given to the act, and the time yet to run being a reasonable part of the whole time, will be considered the limitation in the mind of the Legislature in such cases. Under the circumstances of this case, six months held to be a reasonable time.

Appeal from the Fourth Judicial Circuit for Duval county.

A statement of the case is contained in the opinion of the court.

Ives & Dawkins for Appellant.

It was held by this court, January term, 1872, Hart vs. Bostwick, 14 Fla. 181-2, that the act of December 13, 1861, suspended the pre-existing statute of limitations, and in effect that at that time, January, 1872, there was no statute of this State limiting the time for the commencement of civil actions, and the defendant rested his plea in bar upon the 19th section of the act approved Feb'y 27, 1872, which reads as follows:

"All actions not heretofore barred by statute or that will be barred within sixty days from the passage hereof, shall not be affected by limitations of this act until six months from the date of the approval hereof."

The whole law, of which the above section is a part, having been enacted when no statute of limitations existed, seems to contemplate only actions arising in future, save clause in parenthesis in the first section of the act, and the said 19th section.

The first section reads thus:

"Civil actions can only be commenced within the periods prescribed in this act, after the cause of action *shall have accrued,* (except where a different limitation is prescribed by statute.")

What statute is alluded to by the exception is difficult to

conceive, but it was certainly intended to refer to some statute existing at the time of the passage of this law, such as the statute of non-claim, else it would have been otherwise expressed.

From that clause, taken in connection with section 19, it may be inferred by implication merely that the Legislature intended that the limitations prescribed in this act as to actions arising thereafter, should also be applicable to then existing causes of action commencing six months after its approval, say August 27, 1872, and if that was the intention of the Legislature, which we think is the only rational and reasonable interpretation of the law, the courts are open for the collection of this and all similar claims for five years from and after the 27th of August, 1872, and therefore the appellant's claim could not be considered barred until 27th August, 1877.

It will be observed that the act under consideration, section 19, does not say substantially, or in express words, "that all actions not heretofore barred by statute shall be forever barred, if not sued within six months after approved, &c., but says they "shall not be affected by the limitation of this act, &c.," The limitation of this act upon this class of claims (section 10) is five years. Now, the question is, when does that five years begin? Such period surely did not begin prior to the passage of the act Feb'y 27, 1872, without operating retrospectively, and if it began six months after the approval of the act, the appellant still has his day in court. If the law be construed to operate retrospectively, then indulgent and humane creditors are taken by surprise at the passage of a law giving them only six months to sue, and locked up in the secret avenues of government until the doors of the court are closed against them, for it was about that length of time and perhaps longer before the law was authoritatively published, and it would seem that such a construction would impugn the motive of the Legislature.

The courts will construe legislative enactments in accordance with established principles of law and the common principle of justice. Bradford vs. Shine, 13 Fla., 409, 410, 411.

Positive enactments are not to be construed as interfering with previously existing contracts, rights of action or suits, unless the intent thus to interfere be expressed in the enactment. Butler vs. Palmer, 1 Hill, 325.

All laws are presumed to be prospective, and not retrospective. Dash vs. Van Kleeck, 7 Johns, 485.

An act of the Legislature ought never to be so construed as to do injustice, such as giving a retrospective operation to this law. Ibid, 494.

The act under consideration establishes a new rule of law, and as such, ought not to have a retrospective operation, unless so declared in the most unequivocal manner, which it certainly is not. Ibid, 496.

It is a principle in the English common law, as ancient as the law itself, that a statute, even of its omnipotent parliament, is *not* to have a retrospective effect. Ibid, marginal p., 502 to 503, and so in this country. Watkins vs. Haight, 18 Johns, 139; 1 Kent, 455 and references.

All limitation laws must proceed on the theory that the party, by lapse of time and omissions on his part, has forfeited his right to assert his title in the law. Cooley's Con. Lim., 365, 366, and references.

And they must proceed on the idea that the party has full opportunity afforded him to try his right in the courts. A statute could not bar the existing right of claimants without affording this opportunity. If it should attempt to do so, it would be not a statute of limitations but an unlawful attempt to extinguish rights arbitrarily, whatever might be the purport of its provisions. It is essential that such statues allow a reasonable time after they take effect for the commencement of suits upon existing causes of action. Call vs. Hayne, 8 Mass., 428, 429.

Statutes are not to be construed as to take away any vested right previously acquired under a former statute, if it will admit of any other construction. Smith vs. Morrison, 22 Pick., 432.

Remedial statutes are to receive a liberal construction, and the meaning must be determined by their language.—Ibid, 433.

It is a sound rule of construction that a statute should have a prospective operation only, unless its terms show clearly a legislative intention that it should operate retrospectively. Dash vs. Van Kleeck, 7 Johns, 477.

Statutes of limitation are to be liberally construed in behalf of creditors. Hunt, adm'r, vs. Adams, 7 Mass., 518.

A part of a period of limitation which has elapsed in one State cannot be united with the time that has elapsed in this State to complete a bar. Perry vs. Lewis, 6 Fla., 555, from which it may be held by parity of reasoning that a part of the period of prescription which run under the old statute of limitation of this State, prior to the suspending statute of December, 1861, cannot be united with any newly prescribed period, in order to complete a summary bar to a right of action. And even if such lapping over should be allowed, it would not amount to a bar in this case, for the old statutory prescription had run less than one year, leaving more than *four years to be spliced on by the new law.*

What mean the several phrases of the section 19, act of 1872, and the section taken all together, and the whole law? Section 19 is too vague, uncertain and unintelligible to operate as a retrospective law, even if it is a statute of limitations.

J. W. Malone, (with whom were *Papy & Raney,*) for Appellee.

The act of limitations, approved Feb'y 27, 1872, bars the action in this case, because it accrued more than five years previous to its passage, and the plaintiff did not avail him-

by which it was enacted "that the statute of l now in force in this State in relation to civil every description, be and the same are hereby susp shall have no operation or effect so long as thi continue in force and unrepealed, reserving all r defences under the existing statutes of limitation; *however,* that nothing in this act shall be construe prevent any defendant from pleading said statute of limitation in any cause wherein the same shall before the passage of this act."

This act suspended all limitation as to actions barred until it was repealed, and actions barred b limitations still remained so. Two classes of c therefore embraced in this statute: those in whic itation had not run, and those in which the bar plete. This statute remained in force until expressl by the act of Feb'y 27, 1872. The first section pealing act provides that "civil actions can only menced within the periods prescribed in this act cause of action shall have accrued, (except wh ferent limitation is prescribed by statute.") The tion provides "that all actions not heretofore statute or that will be barred within sixty days passage hereof, shall not be affected by the limi this act until six months from the date of the appr of." Under the 10th section of this act, the limi an action of this kind is fixed at five years. Th action accrued in this case in the month of Ju 1861. This action was brought in the month of A. D. 1873, *over eleven months after the approval of February 27, 1872.*

Two questions are thus presented for our tion: Is this action barred by the act of Feb 1872? Is it within the power of the State thu this action? These statutes are in reference to subject matter, limitations, and must be construe

er. The object of the last must be ascertained by reference to the effect of the first. The conception of the last originated in the intention and desire of the Legislature to remedy the evils following the continued and then present enforcement of the first. The first statute was enacted during an exhaustive war to meet the exigencies of that occasion, and was not adapted to a state of peace and active commercial intercourse. It was the purpose of the Legislature by this last act *to prescribe limitations for all actions to be commenced after the passage of this act, embracing such rights of action as had accrued in the past as well as those that would accrue in the future.* The effect of the first and tenth sections of this act, considered without reference to the 19th section, was therefore to prescribe a limitation of five years to all actions upon a contract founded upon an instrument of writing not under seal, and the period of five years was to be calculated from the time "the cause of action accrued." It made no difference under the sections whether the cause of action had accrued before its enactment or would accrue afterwards, because in either case the time fixed at which the estimate was to commence was the *accrual of the right of action;* nor did it make any difference that the computation thus made embraced a part of the time during which the limitation had been suspended by the previous statute, because the time fixed was arbitrary, and without exception the date of the accrual of the action. If these two sections can receive any other construction consistent with the intention of the Legislature, which was to prescribe a limitation *for all actions to be commenced in future,* we are unable to perceive it. The proposition that the act relates only to *rights of action* to accrue in the future is in conflict with the express letter of the statute and the manifest intention of the Legislature. It would make the statute perpetuate in part the very evil it was conceived to remedy. It is too clear for argument that if the limitation thus enacted refers only *to rights of action that*

are to accrue in future, then all rights of action *that have accrued in the past* are without a limitation under this act, and the suspending statute of 1861 is still in force as to them.

Accepting this, therefore, as the correct construction of these two sections, it only remains to consider the 19th section. That section is in the following words: "All actions not heretofore barred by statute, or that will be barred within sixty days from the passage hereof, shall not be affected by limitations of this act until six months from the date of the approval hereof." It is clear that the purpose of this section is to create an exception to the operation and effect of the general rule of limitation previously prescribed by sections one and ten, as it expressly provides that certain actions *shall not be affected by the limitations of this act until six months after its approval.* The necessary effect of this is that after six months has elapsed, then the limitations of this act will affect and control such actions. This proposition is self evident. These actions are excepted from the operation of these limitations, and the suspension of the limitation as to them continues for six months after the approval of this act, and when that time expires the limitation becomes operative. Is this action one of the particular actions not to be thus affected until the expiration of six months? If it is an action not heretofore barred by statute or that will be barred within sixty days from the passage of this act, then it is plain that it is such an action. The term statute here means any and all statutes of limitation embracing both the antecedent and present statute. If an action was barred anterior to the suspension act of 1861 then by virtue of this antecedent statute, which was then in force, it is still barred. If it was not barred at that time or if it is barred now under this statute, or if it would be barred within sixty days from the passage of this act by its terms, then the limitation of this act shall not operate until six months has elapsed. Applying the law as thus con-

trued to this action, the result is that it was barred after ix months elapsed from the approval of this act. This eriod had elapsed before this action was brought, and the nly question remaining is: Was it within the power of the egislature thus to limit this action? The general power f the Legislature over the subject of limitation of actions s too well settled to admit of question. It is also well set- led that statutes of this character apply to rights of action xisting at the time of their passage, provided a reasonable ime is left after the passage of the act for the party to exer- ise the right before it would operate as a bar. In Ross vs. Duval, 13 Pet., the Supreme Court of the United States use his language: "It is a sound principle that where a stat- te of limitations prescribes the time within which suit shall e brought, or an act done, and a part of the time has lapsed, effect may be given to the act, and the time yet to un being a reasonable part of the whole time, will be con- dered the limitation in the mind of the Legislature in such ases." In this case, therefore, the limitation in the mind f the Legislature was six months after the passage of the ct. In view of the authorities upon the question of reason- ble time in such cases, we cannot set aside the exercise of is legislative discretion.

There is but one ground upon which it can be assailed, nd that is that it impairs the obligation of the contract.— this act had attempted to take away the right of action ntirely, that would be a different matter, but as it gives x months in which to assert it and as the time is a matter f legislative discretion or power, it must stand. The pre- se limitation of six months was sustained by the Supreme ourt of Kentucky in Luckett vs. Dun & Bass, 3 Litt. 219, nd in Smith vs. Packard, 12 Wis. 371, the limit of nine onths was deemed reasonable. See also 4 Texas, 470; 1 art., (Ind.) 56; 3 Foster, (N. H.) 376; 22 Pick., 430; 1 ill, 324.

Judgment affirmed.

JENNETT J. MCCULLOM, IN BEHALF OF HERSELF AND OTHERS, COMPOSING THE WALTON COUNTY MEMORIAL ASSOCIATION, VS. JOHN MORRISON AND MURDOCK E MORRISON.

Where a chattel is of peculiar value and character, and the loss of it cannot be fully compensated in damages, equity will interfere and grant full relief by requiring a specific delivery.

Appeal from the Circuit Court, First Judicial Circuit Walton County.

A statement of the case is contained in the opinion of the court.

D. L. McKinnon for Appellants.

A. E. Maxwell for Respondents.

WESTCOTT, J., delivered the opinion of the court.

In this case, Jennett McCullom, in behalf of herself and others composing the Walton County Memorial Association sues John Morrison and Murdock Morrison.

The complaint states the formation and organization by the plaintiffs of the association; that the members composing the association are seventy-five in number, and live in various parts of the State; that they have a common interest in this action and have authorized its being brought; that the association is not incorporated; that after several years of labor sufficient moneys were raised to erect a monument to the Confederate dead, which was the purpose of the organization of the society, and it was determined to erect it in the county of Walton. That a monument was purchased that soon after the purchase of the monument the then secretary of the association called a meeting of the society, giving but short notice and failing to specify the purpose for which it was called; that at an earlier hour than the time

prescribed for the meeting of the society, less than one-third of the members being present, a vote was taken, and a majority of the one-third then present determined to erect the monument at Euchee Valley Presbyterian Church. That as soon as this action became known, a large majority objecting to such location, called a meeting at which a large majority of the members were present, and it was determined to erect the monument at Euchee Anna; that it was, however, agreed that it should be temporarily erected at the church, and that at a subsequent regular meeting it should be determined at what point it would be permanently constructed; that such meeting was held and that it was then determined to locate it at Euchee Anna, which was accordingly done by the society. That the defendants and others in their employment shortly thereafter pulled down said monument and carried it back to the Valley Church, threatening violence to any one who should interfere with them; that they now assert that if it is removed back to Euchee Anna they will not permit it to remain, and threaten to cement the shaft of the monument to its present site.

Plaintiffs pray that the court may cause the removal of the monument back to its proper place, under the direction of its proper officers, and that the defendants may be decreed to pay all costs occasioned by such removal, as well as such damages as the monument has sustained, and that the defendants may be enjoined from in any manner interfering with, or removing the monument after it is thus returned to its proper place, and from cementing the shaft or otherwise injuring the monument.

To this complaint a demurrer was interposed upon the following grounds:

1. Because the complaint is defective for uncertainty and insufficiency as to parties, both as respects plaintiffs and defendants.

2. Because the facts stated in the complaint do not constitute a sufficient cause of action.

3. Because the facts stated do not give jurisdiction for the appointment of a referee to make inquiry as to the alleged damages, nor to order the restitution of the monument by the officers of the court.

This demurrer was sustained, and from this judgment the appeal is prosecuted.

We can see no defect as to parties upon the face of the bill, and none has been pointed out.

As to plaintiffs, the question is one of common and general interest to the members of this association. Under the direction of the society, one has brought this action for the benefit of all, and this is sufficient. Sec. 70, page 25, Code; Barb. on Parties, 36, 7; 4 Sand., 659; 3 Ves. 72, note.

As to defendants, the case made by the complainant is that the act complained of was done by the defendants and others in their employment and through their procurement. It appears from this that the others beside the defendants connected with the act complained of were simple employees of the named defendants. The entire act was the act of the defendants, and there can be no objection upon the ground of the misjoinder of an agent or employee.

Do the facts constitute a sufficient cause of action, and has the court jurisdiction?

Taking the allegations of the complaint as true, there is unquestionably a case made for relief of some kind. An association is formed for the purpose of purchasing and erecting a monument in memory of the dead. Such monument is purchased and erected at a particular place, after consultation and final action of the members of the association. The defendants, without the least apparent right or justification and with threats and menaces remove the monument to another and different place, and there erect it. After its erection they warn others not to interfere, and openly announce that in the event the society remove the monument to the point at which they desire to locate it and there erect it, they will "tear it down and carry it back."

The plaintiffs seek the recovery of a specific chattel of peculiar character. It is a monument erected in memory of the dead, which has been improperly removed by one having no such authority. The purchase and erection of this monument was the object of the contributions made by this society and the community. The damages recoverable at law would be no adequate compensation in such a case, because there is attached to it a value and peculiar interest much beyond its money value. In addition to this, the plaintiffs seek a restraining order to protect it, and the allegations show the necessity for such action. The complaint is substantially a bill in equity to protect the chattel during the suit, to recover it in specie, and to protect it from damages thereafter. In such a case, the interference of a court of equity is necessary to protect the property from destruction and defacement while the suit is pending, and upon the final hearing, if the case is made out, to grant a perpetual injunction prohibiting any interference with it by the defendants. Under these circumstances a sufficient cause of action is stated in the complaint. Story's Eq. by Red., Sec. 709; Adam's Eq., Sec. 92.

The conclusion we reach is that there is a case made for the recovery of the specific chattel, and that the plaintiffs have properly invoked the equity powers of the court for its protection from threatened damage. This is sufficient to dispose of the demurrer, and it is not deemed proper to go farther and point out the particular form or nature of the final judgment, when that question has not been passed upon by the Circuit Court. Whether the court should direct its officer to reconstruct the monument at its proper site at the cost of the defendants, and the matter of damages, are questions upon which no opinion is expressed, and which are left for the consideration of the Circuit Court, in the event the case is made out.

The order of the court sustaining the demurrer is reversed, and the case is remanded for further proceedings.

ALLEN & FARRAR AND OTIS ALLEN, APPELLANTS. VS. TH FREEDMAN'S SAVINGS AND TRUST COMPANY, RESPONDENT

1. The Freedman's Savings and Trust Company, Plaintiff, advanced a sum of money upon certain commercial drafts, which were afterwards dishonored. The charter of the Savings and Trust Company does not authorize such use of moneys deposited with it, but requires them to be invested in certain other securities; *Held,* That the plaintiff may recover such moneys in an action for money had and received, irrespective of the drafts.

2. In an action by such corporation to recover money so advanced, the Circuit Court issued an injunction against the defendants, who were partners, to restrain them from disposing of or intermeddling with their property, and appointed a receiver of the partnership effects, including a saw mill, and directed the receiver to continue to operate the mill, on the ground that the money obtained by them from the plaintiff was "trust funds," and that such money had been employed by them as a capital in the prosecution of their business of manufacturing lumber at the mill, and that the partners, and others interested as their creditors, had consented and verbally agreed that plaintiff should be first paid out of the earnings of the mill, which agreement had been violated by them; *Held,* That such "trust funds" having been expended by the defendants in the prosecution of their business and not invested in any existing tangible property, but so expended that such moneys cannot be traced and identified, there is no ground of relief in equity or for the issuing of an injunction or the appointment of a receiver; and the violated agreement that the debt should be first paid out of the earnings of the mill, creates no lien upon the mill, and affords no ground for resorting to such remedies.

Appeal from the Circuit Court of the Fourth Judicial Circuit for Duval county.

Thomas O. Allen and Wm. E. Farrar were partners by the name of Allen & Farrar, engaged in the business of sawing lumber for market at their mill near Jacksonville. In 1871 and 1872, they made drafts upon themselves, payable at Boston, for over twenty thousand dollars, which drafts were cashed by the National Freedman's Savings and Trust

Co., at its branch office in Jacksonville, in the usual course of banking and exchange business. This Savings and Trust Company is a corporation created by act of Congress, having its principal office at Washington and branches in various States. These drafts not having been paid, the Savings and Trust Company as plaintiff commenced an action to recover the money thus obtained against Allen & Farrar and Otis Allen of Boston. The complaint alleges that Allen & Farrar are the owners of the mill property at Jacksonville, and that in 1870 they mortgaged it to Otis Allen for $15,000, and alleges, upon belief, that this mortgage debt has been paid, but that the record of the mortgage remains uncancelled for fraudulent purposes; that after the drafts were returned unpaid, the plaintiff, by its agent and cashier, had a conference with all the defendants, in which it was agreed that plaintiff, in consideration of further forbearance, should be paid out of the business and earnings of the mill at least one-half its claim before anything should be paid to Otis Allen upon his mortgage; that after this agreement, Allen & Farrar agreed in writing with Otis Allen to saw lumber for him at the mlll at a stipulated price per thousand feet, Otis Allen furnishing logs, &c., and appointing T. O. Allen, one of the partners, as his agent, and when the cashier ascertained the existence of this contract and inquired of T. O. Allen what it meant, Allen informed him that it was a merely "nominal" matter, and that the agreement with plaintiff would be carried out in good faith and all the earnings of the mill were to be paid to plaintiff. It is alleged that this agreement with Otis Allen was made for the fraudulent purpose of giving a preference to him, and was without consideration; that all the earnings of the mill, and the lumber shipped, went into the hands of Otis Allen, and that he has thus not only received payment of his just claim, but has a large amount of monies which should be applied to plaintiff's demand, and that yet he pretends that Allen & Farrar's indebtedness to him has largely increased; that in

1873, T. O. Allen told the cashier that he had some $4,000 to pay him, but that the mill needed repairs, and asked consent that the money might be expended in repairs, which was agreed to, and afterwards it was ascertained that the money so sued was claimed to have been advanced by Otis Allen and he had taken another mortgage upon the mill to secure it, which mortgage is charged to be fraudulent; that T. O. Allen is the son of Otis Allen, and that he is about to leave the State and dispose of the property of the firm.

The complaint prays for an account of the partnership dealings; that Otis Allen disclose the purpose of the agreement between him and Allen & Farrar, the consideration the amounts received from the mill, the expenditures for repairs and other expenses, and the application of the residue that a receiver be appointed of the partnership property with power to operate the mill, &c., as the partners might and ought to have done, and that defendants be enjoined from disposing of the partnership property, collecting debts &c. The injunction was granted as prayed, and a receiver appointed, who was required to take charge of and operate the mill.

By an amendment to the bill, the insolvency of Allen & Farrar was alleged.

The defendants moved to dissolve or modify the injunction and the order appointing a receiver, which motions were denied.

Afterwards the plaintiff filed an amended complaint, containing substantially the matters already alleged, and further, that the funds obtained from plaintiff by Allen & Farrar were monies belonging to depositors, and were held in trust for depositors and for investment under its charter, all which was known to defendants; that such monies were used by Allen & Farrar in their milling business, and constitute the greater portion of the capital upon which they have carried on business since the fall of 1871, and pray that Allen & Farrar may be treated as trustees to the ex-

tent of the monies received from plaintiff, and that Otis Allen may be dealt with as a trustee to the extent of the monies which went into his hands; that plaintiff may be decreed to have a lien upon the mill property, and its income and earnings and rents, until the plaintiff's claims be paid; that Allen & Farrar be ordered to pay such monies into court or to a receiver; that the injunction be continued, and that the agreement between plaintiff and the defendants, whereby the proceeds and earnings of the mill, and lumber, were to be applied to the payment of the plaintiff, may be enforced.

Whereupon the Judge made an order continuing the injunction and the appointment of the receiver.

The defendants answered severally, T. O. Allen and Farrar admitting the cause of action as to obtaining the money as alleged, and that it is unpaid, and Otis Allen neither admitting nor denying it. They all admit the partnership and the ownership of the mill, the contract to saw lumber for Otis Allen, and that T. O. Allen was the agent of Otis Allen as alleged. T. O. Allen denies the conversation about the $4,000 and the repairs to the mill, and says that they borrowed $4,000 from Otis Allen for the purpose of repairing the mill and gave him a mortgage therefor; that Allen & Farrar obtained the $20,000 and upwards from the plaintiff, and that the bills were discounted in the ordinary course of business, upon their individual credit and responsibility and the liability of their property for their debts. It is admitted that the money obtained from plaintiff was expended in purchasing logs and operating the mill, but they deny that this money constituted the greater portion of the capital upon which the firm have done business, as alleged by plaintiff. It is admitted that the firm of Allen & Farrar is insolvent. The defendants plead the charter and by-laws of plaintiff and the limitations thereby imposed upon it in the conduct of business, and allege that the plain-

tiff violated its charter and exceeded its powers in its trans-
actions with Allen & Farrar, and that the debt sought to
be recovered was created by the act of plaintiff's agent in
carrying on unlawfully the business of banking with the
funds of depositors in the corporation, and that the plaintiff
is not entitled to recover upon said causes of action.

Upon these answers the defendants renewed their motion
to dissolve the injunction and to vacate the order appoint-
ing a receiver, which motion was denied. At the same time
the plaintiff moved for judgment against T. O. Allen and
W. E. Farrar for the amount sued for on the grounds that
the answers were frivolous, and that the answers admit the
amount to be due, which motion was granted by the court
and the receiver was continued until further order. Final
judgment for the amount sued for was entered against T.
O. Allen and Farrar, from which and from all the orders
rulings and decrees relating to the injunction and receiver
and the striking out of the answers as frivolous, the defen-
dants appealed, and all which are assigned as errors.

E. M. L'Engle for Appellants.

1. The 1st to 7th errors assigned relate to the granting of
the injunction and receiver, and the approving of the bond
and undertaking upon the papers before the court.

These points are thereupon taken:

1st. The case made did not warrant the orders nor the
manner in which they were obtained. Ken. on Receivers,
2, 10, 52, 53, 55, 59, 60, 137, 151, 154, 182, 197; 16 Ves.,
69, 70; Hem. Rep., 226; Daniell's Ch. Pl. & Pr., chap.
XXVIII, sec. 1, *passim;* 1 Md. Ch., 70; Code of Proceed. Fl.,
secs. 168, 192; Rule 48 of Rules of the Circuit Court under
the Code; 11 Md., 374.

2d. The plaintiff had no authority to discount notes and
bills, and cannot maintain a suit to recover money so in-
vested, and has no legal existence in this State. 2 Cr., 16;
21 How., 443; 13 Pet., 587, 589; 27 Penn., 351; 7 En. g

L. & Eq. Rep., 505; 16 Eng. L. & Eq. Rep., 180; 30 Eng. L. & Eq. Rep., 120; 4 DeGex, McNaghten & Gordon's Rep., 132; Angell & Ames on Cor., sec. 104; 13 Pet., 519; 1 Black, 297; 22 N. Y. Rep., 281, et seq.; 11 Pet. 543; 12 La. Ann., 496; 21 Penn. State Rep., 9; 2 Cow., 678; 5 Conn., 560; 5 Ib., 574; 3 Wend., 482; 3 Ib., 573; 7 Wend., 31; charter of plaintiff, approved March 3d, 1865, and amendment approved May 6, 1870, especially sections 15 and 6; By-laws of plaintiff, Nos. 7 and 13; Report of the Comptroller of the Currency on the condition of the Freedman's Savings and Trust Co., 1872; Angel & Ames on Cor., secs. 256, 271.

3d. But because the transaction of discounting said bills was unlawful, is not cause why the depositors should lose their money. They have a remedy by suit against the trustees of the corporation at the instance of any depositor, and that is their proper remedy. 16 Beavan's R.; 18 How., 342; 1 Shelf. on R.'s, 284-5; 1 Cr. & P., 1; 2 Mylne & Craig, 621; 1 Swanst., 265; 1 Ves. & B., 226; 3 Wend., 130; Redfield on R., 596, 5th ed.; 10 C. B., 318; 14 Vt., 195; Law Rep. 6 Eq., 112.

4th. The plaintiff had no authority to become a surety for receiver, and an action could not be maintained against it on the bond. (Authorities cited under point 2.)

5th. The receiver cannot operate the mill without borrowing money, which he has no right to do, and the plaintiff has no authority to furnish or advance money for the purpose.

II. 8th assignment. The plaintiff filed an amended complaint, in which it was endeavered to strengthen the case by treating the transaction with defendants as one of trust, and alleging that the mill property is the fruit of trust funds placed in the hands of the defendants by the plaintiff and which the plaintiff has a right to follow. The position is "too thin" to call for serious discussion. The 16th para-

graph shows the property to be worth more than twice the amount of the receiver's bond.

III. 9th error assigned. Every material averment (except the debt) upon which injunction and receiver were prayed for are positively denied by the answers, and the orders, even if they had been justifiable, should, upon the answers, have been vacated.

IV. 10th error assigned. The answers negative the allegations of fraud and combination between the defendants, and show rights vested in Otis Allen touching the property in the hands of the receiver, with which rights the order of the court interferes and which it absolutely destroys. Now whatever may be the judgment of the court upon the 2 point of division I. above, in so far as the position relates to the alleged debtors, Allen & Farrar, it cannot be denied that as between the plaintiff and Otis Allen the proposition of law carries added weight, and I submit that it is well taken. I am aware of the decision in 5 Fla., in the case of the Southern Life Ins. & Trust Co. vs. Lanier, but that does not apply to Otis Allen; and while that decision must be considered the law within this State until the propositions are overruled, I contend that the dissenting opinion is the better law and that which prevails elsewhere than in this State.

The remaining questions I shall leave to be discussed by associate counsel in their brief.

Fleming & Daniel upon the same side, confining themselves to the consideration of the 10th assignment of error, which was that the court erred in holding the answers frivolous.

What is a frivolous answer?

A frivolous answer denies no material allegation of the complaint and sets up no defence. 8 How., 150; 16 How., 135.

It is an answer, which, if true, does not contain any defence, and the insufficiency of which is so glaring as to appear upon a bare inspection without argument. 6 How., 358; 12 How., 544; 1 Abb., 41; 3 Abb., 3; 5 Abb., 455; 3 Sand., 732; 2 Hilton, 475; 14 Abb., 262.

It is not simply an answer bad upon its face, but one which, in the opinion of the court, has been certainly interposed in bad faith for the mere purpose of delay. 8 How., 150.

It is not the motive with which an answer is put in, or its truth or falsity, that is the test on a motion for judgment on account of its frivolousness. If it is a good defence on its face, the motion must be denied. 5 Abb., 455.

No pleading can be called frivolous which traverses a material allegation in the complaint, or sets up matter which, if true, constitutes a defence to the action. 15 Abb., 346; 4 How., 155; 6 How., 331; 1 Abb., 185; 4 Duer, 630; 14 Barb. 393.

The gist of this action consisted in the allegation by plaintiff against defendants of a fraudulent combination on which was based their prayer for the extraordinary interposition of the court to stop the business of the defendants, Allen & Farrar, and to place their property in the hands of a receiver. All of these facts were denied in the answers of of T. O. Allen and Wm. E. Farrar.

It was argued by plaintiff's counsel that the pleading will be held frivolous when there is a decision in point adverse to its sufficiency, and authorities cited to sustain this position; and hence it was argued that the answers were frivolous because one of the points made in the answers was opposed to the decision cited from 5 Fla., 110. And this argument seemed to have great weight with the court below. But this decision did not go to the whole answer, and it cannot be held that because one of the points made had been decided adversely, the defendants should lose the benefit of all the others not so decided. While, then, we may admit

that if there had been a decision made that just such a swers as the defendants were insufficient, then we wou agree that the authorities invoked would be pertinent ar the argument convincing.

A court will not hold a pleading frivolous and give jud ment on it unless it clearly appears to be made for the pu pose of delay, or unless the grounds stated in it are clear untenable. 2 Abb., 414; 12 How., 544; 12 Ib., 563; Ib., 331; 6 Ib., 21; 7 Abb., 447.

We submit to the consideration of the court whether the is anything in the answers adjudged to be frivolous whi indicates that they were put in for delay, and whether t points made against the action of the court in appointi the receiver are untenable, or are such as will be sustain by this court.

To authorize a judge at chambers to give judgment a account of the frivolousness of the pleading, it should be palpably bad as not to require an argument in support the motion. 1 Abb. Pr., 187; 10 How. Pr., 19; 12 H 544; 6 Ib., 21.

All of the authorities above cited may not be accessib to the court. We cite, to sustain the doctrines of this br and refer the court to Voorhees' Annotated Code, 10th R vised Edition, page 362, and notes b. and c. on that pag and page 363, note a. Also to 1 N. Y. Pr., (Tiff & Smit 45, 7.

H. Bisbee, Jr., for Respondent.

The agreement to pay plaintiff out of the earnings a proceeds of the mill for money belonging to and a part o trust fund, will be enforced in equity, and creates a lien the mill property, its rents and profits. 2 Sto. Eq. Jur., se 1231, 1244, 1217; 1 Cur. Cir. Ct. Rep., 297; 1 Ves. C Rep., 477; 3 Paige Ch. Rep., 376, at large; 18 N. Y., 4 482, 453; 2 Sto. C. C. R., 335; 3 Ib., 182, 285, 286, 2 289.

Such an agreement was an apropriation or assignment of the earnings of the mill, which will be enforced in equity, and may be by act as well as writing. 2 Sto. Eq. Jur., 1047; 2 Ib., 1040, note 8.

Expected profits are subjects of a contract to be enforced in equity. 2 Sto. Eq. Jur., 1040.

The defendants are subject to be treated as trustees and to be peremptorily ordered to pay the money sued for into court. Code of Pro., 59; 2 Sto. Eq. Jur., sec. 1252.

Defendants are trustees by implication of law. They have received money which they cannot conscientiously withhold. 2 Sto. Eq. Jur., secs. 1255, 1257, 1258.

A court of equity will hold a wrong doer a trustee for the party entitled by way of remedy for the wrong done. 3 How., 333; 2 Ib., 619, 649, 650.

Defendants claim that the contracts under which they received the money were illegal, and that the money cannot be recovered back. The suit was not brought directly on the contracts, to-wit: drafts. They are set forth by way of showing how the money was obtained, and to state the amount thereof. Such contracts are not prohibited by plaintiff's charter, but even though contracts of certain character are prohibited by law and therefore void, the money obtained thereon may be recovered back. Angell & Ames on Cor., sec. 242, citing 22 Pick., 181; 17 Barb., 384; Ib., secs. 260, 263, citing among other cases 9 Mass., 423; 5 Ala., 787; 6 Smede & M., 179; 13 Cow., 249; 5 Fla., 110.

Notice to defendants that these moneys were trust moneys and were so held by plaintiff's agent. The act of Congress creating the plaintiff was a legal notice to all persons that the moneys held by it were trust moneys. Angell & Ames on Cor., 246, sec. 265.

All persons in or out of a State are bound to take notice of public laws limiting the power of corporations. 3 McLean, 102.

RANDALL, C. J., delivered the opinion of the Court.

I. The first question deemed necessary to be disposed of is one raised by the answers of Allen & Farrar, in which they insist that that the plaintiff in advancing money to them in the common course of mercantile business in discounting their drafts, violated its charter and exceeded its powers; unlawfully carrying on the business of banking with the funds of depositors held by it in trust for other purposes specified in its charter, and therefore that the plaintiff has no right of action. This action is brought to recover money so advanced.

Were this a new question here we might deem it prope to enter into some discussion of the principles involved. Bu this court has long since disposed of it, and we are entirely sat isfied with the law as it has been thus settled. By the charte under which the plaintiff exists, it is authorized to receiv deposits and hold them in trust for depositors and inve them in bonds and securities of the United States, bearin interest. The corporation is thus by its charter a trustee all the funds deposited, and the moneys deposited a "trust funds." There is nothing in the charter which d clares any other transaction, not expressly authorized, any other security taken for such moneys loaned or a vanced, to be *void*. The courts generally hold that howev such a corporation may, by unauthorized transactions, vi late the law under which it exists, and thus subject itself to be proceeded against as for a forfeiture of its franchise, it does not lie with one who has thus obtained its funds a impaired the security of depositors and the public to co summate a fraud against them by such a plea. Southe Life Insurance & Trust Co. vs. Lanier, 5 Fla., 110, 164, a cases cited; Utica Ins. Co. vs. Scott, 19 John R. 6; Mu vs. Stokes, 4 T. R., 561, per Lord Kenyon and Buller, J.; Parker vs. Rochester, 4 Johns. Ch. R., 332: Robinson vs. Bland, 4 Burr, 1077; Angell & Ames on Corp., 242.

Selden, J., in Bissell vs. The Mich. So. and N. Ind. Railroad Co., 22 N. Y., (Court of Appeals,) while holding to the fullest extent that contracts by corporations, which are unauthorized and entirely beyond the powers of corporations, in view of the limitations contained in their charters, are void and will not therefore be enforced, yet holds this language, (p. 305): "It has been repeatedly held by this court, that where corporations by means of contracts or engagements prohibited by law, i. e., which are unauthorized by their charters, have obtained from other persons any money or other thing of value, while the contract itself is void and can never be enforced, the corporation may nevertheless be compelled, in a suit brought in disaffirmance of the contract and founded upon the equities of the case, to restore what it has obtained."

Under this rule, the plaintiff's action in the case at bar may be sustained against Allen & Farrar, as the amended complaint does not claim judgment upon the drafts, but for money had and received irrespective of them.

II. The plaintiff insists that it was entitled to the provisional remedies employed, viz: the aid of an injunction and a receiver to reach the property of the defendants, Allen & Farrar, in which the "trust funds" were supposed to be involved or invested.

The doctrine that trust funds will be followed into whatever property or into whosoever hands they may be traced, for the protection of the *cestui que trust* against fraudulent transactions, and the like, is guarded with extreme jealousy and vigilance by courts of law and equity everywhere, and we would gladly apply the rule to the present case if it were practicable to do so.

In this instance the Freedman's Savings and Trust Company, plaintiff, by its cashier and agent, advanced to Allen & Farrar, a firm engaged in the business of buying logs, sawing timber and lumber for market, and selling, shipping and consigning it in the ordinary course, a large sum of money

belonging to the customers of the Trust Company, upon certain bills and drafts drawn by them upon their house in Boston, Mass., which drafts were not paid. Allen & Farrar owned the mill where lumber was manufactured in this State. The money was used in the purchase of logs, the hire of labor and other expenses of the firm in conducting their business, in the payment of debts incurred in conducting it, and in repairs of their mill, &c. The money was obtained from the plaintiff in the same manner as it might have been obtained from bankers, viz: by the discounting of defendants' drafts, without stipulation as to the manner in which the money should be expended by them. It does not appear that the defendants, Allen & Farrar, had any other connection or relations with the plaintiff except as a borrower for business purposes. The character of their business was known to the agents of the plaintiff. The identity of the money loaned was lost as soon as it was placed with other moneys and used by defendants in their business, and it ceased to be "trust funds," and became the property of the firm.

Where a party purchases *trust property,* knowing it to be such, from the trustee in violation of the objects of the trust, courts of equity will force the trust upon the purchaser and hold the property subject to it in the same manner as the trustee held it. And "wherever the property of a party has been wrongfully misapplied, or a trust fund has been wrongfully converted into another species of property, if its identity can be traced, it will be held in its new form liable to the rights of the original owner, or *cestui que trust.*" "It matters not in the slightest degree into whatever other form different from the original the change may have been made, whether it be that of promissory notes, or of goods, or of stock; for the product of a substitute for the original thing still follows the nature of the thing itself so long as it can be ascertained to be such. *The right cases only when the means of ascertainment fail,* which, of course, is the case

when the subject-matter is turned into money and mixed and confounded in a general mass of property of the same description." See Story's Eq. Jur., sections 1,257-8-9, and the English and American cases cited.

In the present case a great difficulty seems to exist in the fact that nothwithstanding Allen & Farrar knew the character of the moneys in the possession of the plaintiff, yet it was practically impossible for the plaintiff to identify it the moment after it went in their possession, and it could not therefore be followed. It was not invested in any particular article or parcel of property, but used and dispersed in such manner, as we have seen, from the nature of their business, that "the means of ascertainment failed" on the instant. The money was obtained in 1871. In 1873, when this suit was commenced, it had clothed and fed a retinue of laborers at the mills and logging camps, and the lumber had gone to the several quarters of the globe. There was nothing left of the "trust" funds. The authorities cited by the plaintiff's counsel, it seems to us, do not bear him out in his propositions. The effort is to establish a lien upon the mill property itself, and upon its earnings, because of the character of the funds loaned, and by reason of the agreement between the parties and other creditors soon after the protest of the drafts. "It was agreed that Allen & Farrar should go on with their business, sell the lumber on hand amounting to nearly two millions of feet, and apply the proceeds to the satisfaction of plaintiff's demands; to which Otis Allen agreed and consented to look to the future for his pay." (This is the allegation of the plaintiff, and though denied or qualified by the defendants, we will treat it as undisputed for the purpose of this case.) "And relying upon this agreement for payment out of the proceeds of sales of lumber on hand, plaintiff forebore legal proceedings, and relied in good faith upon such agreement. And while plaintiff's agent was reposing confidence in defendants and entertaining the hope

of early payment from the proceeds of the lumber, the defendants were practising treachery with consummate skill."

Now, we do not see how this statement of facts, taken in connection with the loan, affords the basis of a lien of any kind upon the mill property. All the parties agreed to repose further confidence in Allen & Farrar, to give time and rely upon their faithful application of the proceeds of the lumber on hand to the payment, first of plaintiff's claim and then of other claims. Whatever grounds their conduct may have afforded for attaching their property in a suit at law, it created no right in the plaintiff to pursue the extraordinary remedies which were invoked. There was no trust or lien created which might be enforced as against the mill or its earnings in equity. The whole was a mere verbal arrangement, which seems to have been disregarded by all except the plaintiff.

Here is no specific lien as for purchase money, nor as for property consigned for a specific purpose, nor as between partners, nor a case of accident, fraud or mistake, to which classes of cases the authorities cited seem to apply.

The Code authorized the appointment of a receiver "before judgment, on the application of either party, when he establishes an apparent right to property which is the subject of the action, and which is in the possession of an adverse party, and the property, or its rents and profits, are in danger of being lost or materially injured or impaired, *except* in cases where judgment upon failure to answer may be had without application to the court."

Now it seems clear that by the very terms of this section a receiver should not have been appointed in this action. The cause of action was contract for money only, precisely the case to which the exception in the above section applies, for judgment upon the cause of action could, under the Code, have been had without application to the court, upon failure of defendants, Allen & Farrar, to answer.

Nor does the complaint show cause for the injunction. It

was entirely settled before the adoption of the Code that a creditor could not by injunction restrain or interfere with the control of the defendant's property until he had established his claim by judgment and issued execution thereon. The Code changed the rule so as to allow an injunction before obtaining judgment in the cases specified in section 168. It must appear—1, that the plaintiff is entitled to the relief demanded in his complaint and that such relief or some part thereof consists in restraining the commission or continuance of some act, which, during the litigation, would produce injury to the plaintiff; or—2, when it shall appear that the defendant is doing, or threatens, or is about to do, or procuring, or suffering some act to be done in violation of the plaintiff's rights respecting the subject of the action and tending to render the judgment ineffectual; and—3, where during the pendency of an action it shall appear by affidavit that the defendant threatens, or is about to remove or dispose of his property with intent to defraud his creditors.

It cannot be insisted that the first or second divisions of the section can be applicable, because the action is for the recovery of money and incidentally seeks the aid of ancillary measures in securing its payment. The third division only can be made available, but the plaintiff has not shown that the facts exist which entitle him to the restraining process. The section does not relate to any act already consummated by the defendant or others, but to threats or acts which may be done. Nor is any ground shown for making Otis Allen a party to this action brought to obtain a judgment against the debtor, he not being a party to the original transaction, nor having made himself liable as a joint debtor or as surety. This is not fatal to the whole action, however, for the court is authorized, either of its own motion, or on the application of parties to amend in that particular by striking out the name of a party. Sec. 123, Code.

One of the errors assigned is that the court held the answer to be frivolous and gave judgment against T. O. Allen

& Farrar for the amount claimed and by them confessed to be due. Treating the action as we do, as a suit for the recovery of money only, and regarding the various other matters contained in the complaint as surplusage, and there being no issue as to the cause of action except the question of *ultra vires,* we cannot say that there was any legitimate issue made by T. O. Allen & Farrar in their answers. They admit the cause of action as stated in the complaint, and we therefore must permit the judgment as against them to stand.

The judgment of this court is that the judgment of the Circuit Court in favor of the Freedman's Savings and Trust Company against Thomas O. Allen and William E. Farrar be affirmed. That the several orders of the Circuit Court awarding injunction and appointing a receiver must be set aside, and the receiver discharged upon rendering a satisfactory account of his doings to the Circuit Court. The Circuit Court will forthwith direct that the mills and other property, which came to and still remain in the possession of the receiver in pursuance of his appointment, be surrendered to them. As to the defendant, Otis Allen, the suit must be dismissed with costs. The appellants must have judgment for the costs of this appeal.

The Clerk of this Court is directed to send without delay, to the Circuit Court for Duval County, a copy of the judgment of this court, together with a copy of this opinion.

FRANCES E. MILLER, ADMINISTRATRIX, APPELLANT, VS. JOHN J. WHITE, RESPONDENT.

1. While a suit in replevin is pending, in which the property in controversy has been delivered to the plaintiff by the sheriff, in pursuance of the statute, an action by the defendant against the plaintiff in the replevin suit cannot be maintained to recover the value of the property. During the pendency of the replevin suit, the property is actually or constructively in the custody of the law; the remedy must be had by action against the plaintiff in replevin, or upon the bond, after judgment in favor of defendant upon a trial or dismissal of the suit.

2. While such replevin suit is pending, the plaintiff, or his representatives, filed a bill in chancery against the defendant, and another for the purpose of annulling the contract of sale, under which the defendant in the replevin suit became possessed of the property, and to stay proceedings in the replevin suit. This suit in chancery remained at issue for several years, neither party bringing it to trial or hearing, and meantime the plaintiff and complainants died. *Held*, That these circumstances afforded no ground for a suit in equity by defendant in the replevin suit against the present administrator of the plaintiff solely to recover the value of the property, the two first mentioned suits being undisposed of.

Appeal from the Circuit Court of the First Judicial Circuit for Washington county.

A statement of the case is contained in the opinion of the court.

J. F. McClellan for Appellant.

D. L. McKinnon, for Respondent.

RANDALL, C. J., delivered the opinion of the court.

It is impossible to determine upon what ground the jurisdiction of the court of chancery can be maintained under the bill and answer in this case.

The complainant purchased of one Ashley Miller a negro man called George, valued at eleven hundred dollars, who

had belonged to Robert L. Potter. This Potter was adjudged to be of unsound mind, and a guardian was appointed for him, who commenced a suit in replevin against complainant, and by virtue of the writ of replevin took George from complainant's possession. Pending this suit, R. L. Potter died and W. R. F. Potter and Nathaniel Miller were appointed administrators of his estate. The administrators then commenced a suit in equity against complainant and Ashley Miller, alleging a fraud in the purchase of George from R. L. Potter, and also that Potter was of unsound mind and incapable of contracting, and prayed that the contract of sale be declared void, and that the replevin suit be stayed. This bill was answered upon the merits by the defendants. The present bill charges that the replevin suit was thereupon dismissed, but the defendant denies any knowledge of the dismissal. The suit in equity has not been determined. The administrators of Potter have both died, and this defendant has been appointed administratrix *de bonis non*. The answer alleges that proceedings are in progress to revive and prosecute the suit in equity for the purpose of annulling the contract of sale.

The answer sets up the pendency of these suits among other matters of defence.

Nothing is better settled than that a court of chancery has no jurisdiction where there exists an adequate remedy at law, with very few exceptions of concurrent jurisdiction, of which the present case is not one.

If the replevin suit is yet pending, that may be brought to trial and judgment.

If the replevin suit has been dismissed, the complainant may have his remedy upon the bond.

If the equity suit brought against the complainant and Miller shall be decided against them, and the title of the boy George decreed to have remained in Potter on account of fraud or other cause, that will be decisive of complainant's claims set up in this suit.

far as can be ascertained from the pleadings and proofs
s case, the replevin suit and the suit to annul the con-
of sale are yet pending in the courts of this State, af-
only by the death of parties, and not by any insur-
able difficulties.

complainant seeks to recover the value of the boy
e, so taken in replevin from him, and upon a trial be-
jury a verdict was given in his favor for twenty-one
ed and eighty-six dollars and twenty-five cents, for
sum judgment was rendered, and from which judg-
his appeal was taken.

boy was taken from complainant's possession by due
s of law, by the officer of the law, and delivered to the
te according to law, and while the suit is still pend-
is supposed to be held upon the process of the law;
cannot be allowed that the defendant in replevin
while such facts exist, turn round and sue the plain-
the replevin suit and recover the value of the proper-
title to which is involved in the first suit.

ncery abhors a multiplicity of suits, and to maintain
ll would be to encourage and multiply litigation, and
uce "confusion worse confounded."

judgment appealed from must be reversed and the
remanded, with directions to dismiss the bill.

ERR DAVIS, APPELLANT, VS. DAVID R. SHULER, APPELLEE.

1. Where a plaintiff in ejectment claims title by virtue of a sale and deed under execution issued upon a judgment recovered by the plaintiff against a "sheriff as *ex officio* administrator" of a deceased debtor, and the defendant in ejectment is a stranger to the judgment, it is incumbent upon the plaintiff to prove upon the trial, in addition to the execution and deed, the judgment and the fact that the sheriff was duly authorized to act as such administrator at the time the suit was brought against him.

2. A sheriff is not, by virtue of his office, the administrator of a deceased person, and can do no act to bind the estate as administrator until empowered so to act by the probate court; and a judgment entered against a "sheriff as administrator *ex officio*," who is not empowered so to act by the order of the probate court, cannot bind the estate. See Thomp. Dig., 198-9; Chap. 157, Laws 1848, Sec. 3.

3. The proper evidence that one is an administrator is the letters of administration, or a certified copy, or a certified copy of the order directing the sheriff to act as such.

4. It cannot be alleged for error that the court struck out or refused to strike out a plea alleging only facts which may be given in evidence under the general issue.

Appeal from the Circuit Court of the Second Judicial Circuit for Jefferson county.

A statement of the case is contained in the opinion of the court.

S. Pasco for Appellant.

The general rule as to the purchaser at sheriff's sale is, that he must show his deed and the execution and return, and prove title in the defendant. Some authorities go further and require, at least under certain circumstances, that the judgment upon which the execution was issued must also be exhibited. 12 J. R., 213. In the present case, the judgment, execution and return and deed were all introduced, and must all be presumed to be regular, for no ob-

jections were offered, (except to the character of the defendant in execution.) The pleadings admitted that the decedent, Branch, died seized and possessed of the lands, and it is urged that if the said S. B. Baldwin was not administrator, that the burden of the proof was upon the defendant to show it. Steph. on Plead., 84; Greenf, on Ev., sec. 74. It is the subject-matter of one of his special defences. A judgment of a court of competent jurisdiction is introduced against him in that capacity, and the presumption must be that it is correct. 2 Fla., 207, 283, 268. But the appellant, when so required by the court, and after he believed that his case was made out, offered proof that the said Baldwin, at the very time of the rendition of the judgment against him, was recognized by the county court in the county where the lands were situated as administrator of the said estate. This ought to have been sufficient, for the county court had entire control of the subject-matter of the administration, and its order in the matter was in the nature of a decree in rem, final and conclusive, binding upon the whole world, subject to no examination, except on appeal, not to be attacked collaterally. Rule of Ct., 22, (under the Code;) Big. on Est., Intro., XLVIII; 1 Story, 547; 24 Vt., 42; 15 La. Ann., 27; Big. on Est., 136, cases there cited, 159, 160, 175.

Will the court go into an examination of the question as to whether the said S. B. Baldwin was properly sued as sheriff and ex officio administrator of Caswell W. Branch by Mr. Davis? This is the point that the court below and the appellee's counsel were aiming at, and as the question has been raised it would be well to settle it. The plaintiff admitted that he had no other proof to offer that S. B. Baldwin was administrator. The defendant claimed that letters of administration or an order of the judge of the county court must issue to constitute the sheriff an administrator. We claim that he needs no such authority, and that he may be sued at any time after the expiration of six months from the

time of a decedent's death as the administrator. The following reasons are submitted in support of this view:

1. The uniform practice of courts of probate has been to recognize the sheriff as administrator when thus acting, and the practice of the bar has been thus to bring the sheriff to an accountability as administrator.

2. The law makes the sheriff an administrator *ex officio*. Thomp. Dig., 198, sec. 3. He takes no new oath; no new bond is required of him, and the notice required by the subsequent statute (act approved Jan. 7, 1848, chap. 157, sec. 3,) gave the sheriff no new authority. It was intended for his protection; to reduce his liability. See 8 Cranch 9. The law making the sheriff *ex officio* tax collector is very different in its requirements. Thomp. Dig., 93.

3. The matter rests entirely upon the statutory law of the State, and that law makes it the duty of the sheriff to administer on the estate of every decedent, who has died having property upon whose estate no person has been appointed administrator for the space of six months, and the supposition must be that the officer has done his duty. If not, he must enter upon it instanter.

In conclusion, it is manifest to the appellee that the appellant's case was made out, provided that Baldwin was properly sued as administrator. The appellant has attempted to prove that the Circuit Court could not in this action examine into the administration; that it was concluded by the judgment in Davis vs. Baldwin as sheriff and *ex officio* administrator, and further by the recognition of the county court; but that the Circuit Court, if it had jurisdiction to hear and determine the authority of Baldwin as administrator, should have settled the question in the affirmative. The defence set up by the defendant is technical. He sets up no title; he claims to have paid no money for the land; he has no estate by inheritance; he has been many years in possession; does not pretend that he pays rent to any one; the property has largely diminished in value since he as-

tened himself upon it, and the record must satisfy an unprejudiced person that he is a mere interloper. The plaintiff is trying to collect a debt that is not impugned. It has been many years due. He has established it before the courts, and is surely now entitled to the legitimate fruits of his judgment. Under the law, he is a *bona fide* purchaser for valuable consideration, and as such is entitled to the favorable consideration of the court. And we claim, under the last error assigned, that the judgment should have been in his favor.

Scott & Clarke for Appellee.

Did the court err in requiring plaintiff to prove that Baldwin was administrator at the time the judgment was obtained against him?

If Baldwin was not administrator when the judgment was rendered, the judgment is void. The court had no jurisdiction of the person of the administrator of Branch. A void judgment may be attacked, even collaterally, in any proceeding. See 1 Fla., 207, 267; 9 Ga., 247, 440, 130. Especially may such a judgment be attacked when, as in this case, the party obtaining it is seeking to enforce it against a third party, or invoking its aid in support of his title in an action of ejectment. If the judgment was void, no title passed, even though appellant had been an innocent purchaser, and with greater force must it apply to the appellant, who was the party plaintiff to the judgment under which the property was sold and who purchased under his own judgment. And besides, the bill of exceptions does not show that the appellant excepted to the ruling of the court contained in the first error assigned.

The court did not err in ruling out the certificate offered. It was incumbent on plaintiff to show that Baldwin was administrator when the judgment was rendered. The best evidence of this is the order of the county court appointing him administrator or ordering him to take charge of the es-

tate. Unless such order was made, he was never *ex offic* administrator. See Bush's Dig., 52-3, secs. 12, 13, 14. the absence of such order, he had no warrant or authori to act as administrator, and could not be treated as admi istrator *ex officio*. In the absence of such order, the coun court had neither jurisdiction nor authority to grant a d charge. The certificate of the pretended discharge offered evidence does not show or pretend to show that such ord was ever made, or that Baldwin was ever authorized to a as administrator. It simply recites that it appeared (n from the record of that court, however,) that he had be "acting as administrator, and that such administration w ancillary." How acting? Not by virtue of an appoi ment of that court, nor by virtue of his office of sheriff, f that is nowhere recited in the certificate. If it proves an thing, it is that Baldwin is not the administrator of said e tate, and that if he ever interfered with said estate or acte in any capacity, such interference was in his own wron and he should have been charged as executor *de son tor* and his representative character proven by his acts. Thi certificate is introduced to prove something outside of th records of the county court, for which the certificate of justice of the peace would have been as good evidence. Be sides, from its uncertain character, indefiniteness, and n to say untruthfulness, it was calculated to mislead the jur and was rightly ruled out by the court.

On the third error assigned—that the verdict of the jur should have been for the plaintiff—we have only to say th they had no evidence before them. The record of the jud ment, report of sale, deed and other evidence offered b plaintiff were permitted to be read only on condition th plaintiff would afterward show that Baldwin was the a ministrator of Branch when the judgment was render Failing in this, the whole evidence was ruled out, with t certificate afterwards offered.

On the error assigned, that the court erred in overrul

the motion to strike out defendant's answer on the ground of irrelevancy. As to irrelevant pleadings, we cite 2 Van Santvoord's Pl., 318-19, 721-2. A pleading is irrelevant which has no substantial relation to the controversy between the parties to the suit; "one which is good in form and true in fact, but which has no relation to the cause." Ib., 594, and especially Ib., 600-3. A purchaser at a judicial sale acquires only the title of defendant in execution at the time judgment was rendered. The officer sells only the interest of defendant in execution, and the rule *caveat emptor* applies in all its strictness. Rorer on Jud. Sales, 28, 29. There can be no valid sale under an execution issued on a void judgment, or where judgment is reversed for want of jurisdiction. Ib., 30, 31. The plaintiff in execution is a party and not a *bona fide* purchaser, and a reversal of the judgment under which the sale was made restores the parties to their original positions. Ib., 62. If the judgment is void for any cause, the sale is void. Ib., 249-50. A judgment *in personam,* without jurisdiction of the person, is void, and execution thereon is void. Ib., 257-8. If for any cause the proceedings, sale or deed are void, they may be attacked collaterally. Ib., 170.

RANDALL, C. J., delivered the opinion of the court.

This was an action of ejectment, commenced in Jefferson county by the appellant claiming title by virtue of a judgment and execution and a deed executed upon a sale thereunder.

The plaintiff, instead of merely asserting his title and right of possession, has seen fit to state the evidence of his rights, and says that in February, 1872, he recovered judgment in the same court against Sturgis B. Baldwin as sheriff and, by virtue of his office, administrator of Caswell W. Branch, late of Georgia, deceased; that an execution was issued to a constable, and after fully complying with the law relating to sales, &c., "the following described lands,

to-wit: Lot No. 139, according to the Georgia survey, containing eighty-one acres, *or so much of said lot as belonged to the said Caswell W. Branch* at the time of his decease, were knocked off and sold to plaintiff and a deed of conveyance was executed to him by said constable;" that he has demanded the said lands by virtue of his right and title derived from said conveyance from defendant, who has refused to surrender and still withholds the same from him. An amendment to the complaint gives the boundaries of the said lands.

The defendant answered, first, denying that he unlawfully withheld the premises; 2d, that in 1863, Caswell W. Branch, who then owned the premises, died intestate, leaving a widow and a son; in 1865, defendant married the widow; the son died in 1863, and the widow of Branch, defendant's wife, died in 1871 intestate; that at the time C. W. Branch died, the premises were in Thomas county, in the State of Georgia, and he had personal property in said county; that the estate was administered in Thomas county by one Smith, administrator, and under the order of the court of ordinary there, the said administrator sold the property to the defendant, who, prior to the sale, was in possession of the premises as tenant of the administrator, and since the sale in his own right as purchaser; and 3d, defendant answers that Sturgis B. Baldwin is not and never has been the legal administrator of Branch, and the judgment and sale mentioned in the complaint are null and void.

The plaintiff moved to strike out the second and third paragraphs of the answer, which motion was overruled and plaintiff excepted, and this ruling is the first ground of error assigned.

It is unnecessary to discuss this matter at much length. The first answer puts in issue the plaintiff's right of possession. The second alleges that the property was in the State of Georgia, where it was the subject of administration and was sold under the order of a Georgia court. If this be true,

we do not understand how it can be the subject of an action of ejectment in Florida, and as the plaintiff must show that the property is in this State, the proofs to that end being subject to contradiction on the part of the defence, it was unnecessary to plead it specially, everything relating to the location contained in this plea being proper matter of proof in this action without being pleaded. But we do not see how the ruling of the court one way or the other could affect the case materially.

As to the third paragraph of the answer it is certainly responsive to facts alleged in the complaint, and as to such facts, it is a complete denial and defence, if true, for a judgment against one as administrator who was not an administrator does not bind the estate, and an execution issued upon such judgment cannot legally be levied upon such estate. See Griffith vs. Fraser, 8 Cranch, 9.

The second error alleged is, that the court required the plaintiff to prove that S. B. Baldwin was administrator of Caswell W. Branch.

The complaint alleges that the plaintiff recovered a judgment against Baldwin as Sheriff and *ex officio* administrator of Branch. The plaintiff by his allegations has thus confined himself to a particular mode of proving title, to wit: that he recovered a judgment against the sheriff as *ex officio* administrator of the estate of Branch, and this is denied by the defendant.

No person can be divested of his estate against his consent but by due process of law, and every one whose possession is attacked may demand that every step necessary to deprive him of it has been substantially pursued according to law.

The appellant insists that the sheriff by virtue of certain acts of the legislature (Th. Dig. 198,199,) is *ex officio* administrator in certain cases. First, "when any person shall die leaving property in this State, and for the space of six months thereafter no person shall be appointed administrator on the estate of such deceased person, it shall be the duty of the

sheriff of the county *ex officio* to take charge of such estate, and to administer on, and settle said estate in the same manner as directed for other administrators." And second, in case an administrator shall die or his letters be revoked and no other person be appointed according to law, "it shall be the duty of the sheriff *ex officio* to proceed to administer on and settle such estate under order of the Judge of Probate." Section 3 of chapter 157, approved January 7, 1848, provides that "no sheriff shall be held responsible as administrator *ex officio* of any estate, till he shall have been ordered by the Judge of Probate of his county to take charge of the assets of the person deceased."

Although these statutes authorize and make it the "duty" of the sheriff, in certain cases, to administer upon the estates of deceased persons by virtue of his office, he is not necessarily by virtue of his office an administrator. Certain other facts must exist before he can be required to act, and he can act even when those other facts exist only when ordered to do so by the Probate Judge, "in the same manner as *other administrators,*" and when so ordered and empowered he becomes the administrator of the estate. Until so ordered, he cannot be held responsible *as* an administrator, for he has no power over the estate and can do no act which will bind the estate. He is not an administrator, therefore, merely by virtue of being sheriff.

The complaint states that a judgment was rendered against Baldwin "as sheriff and by virtue of his office administrator," &c. Now if the sheriff cannot administer merely "by virtue of his office," this allegation does not properly charge that he was an administrator so as to bind the estate of the deceased, for it does not follow that the sheriff is possessed of the assets of the estate merely because he is the sheriff. It seems clear that he is entirely without authority to perform any act to bind the estate, unless he acts under the express authority of the court, "in the same manner as directed for other administrators;" and when he is so directed,

his acts are those of an administrator and not those of a sheriff.

The real estate in the hands of an executor or administrator is *equally* liable with personal property to an execution issued upon any judgment against such executor or administrator. Th. Dig., 203.

A judgment against an administrator does not bind the real estate of a deceased person, but is only evidence of the indebtedness of the administrator as such, and an execution can only seize the lands as assets in his hands.

We have already seen that a judgment against one *as* an administrator who was not an administrator, does not bind the estate, and an execution upon such judgment cannot legally be levied upon the estate. Griffith vs. Fraser,cited *ante*- And as the plaintiff must show affirmatively everything necessary to bind the estate, it rests upon him to show that his judgment is one which binds the lands in question. The judgment may be conclusive as against the person sued to charge him, but as against others who were not parties and had no opportunity to defend, it is not evidence of a collateral fact, particularly of the official character of the representative, and therefore does not prove *per se* that the estate is bound.

If this conveyance had been made by one signing himself as administrator, it could not be said that it would bind the state, unless the official character of the grantor is otherwise shown.

Here, the grantor is the officer who sells and makes the deed. He is empowered by law to sell and convey under an execution as fully as the defendant or his attorney might do. He acts in fact as the attorney of the defendant, appointed by law for that purpose. Cooper's lessee vs. Galbraith, 3 Wash. C. C. R., 546.

To establish a title under an execution sale there must be shown, as against a stranger to the proceedings,a valid judgment and execution binding the estate of the defendant in

the judgment, and that the defendant had some title or interest in the property sold. Real estate being by the statute assets in the hands of the administrator for the payment of debts, cannot be seized upon an execution against one who is not in law and in fact a administrator, so that to show affirmatively that the judgment binds the property in question, necessarily requires that the proof of the official character of the defendant in the judgment and execution shall be given in the first instance.

(We do not understand that the court in the case of Hartley vs. Ferrell, 9 Fla., 374, decides that the title of the plaintiff in ejectment is shown by proof of the execution and the deed, without also showing the judgment, when the defendant in ejectment is a stranger to the judgment and was not in possession at the time of the sale. The head note to the case referred to applies appropriately to the circumstances of the case there decided.)

The ruling of the court, therefore, in requiring the plaintiff to show that Baldwin was duly authorized to act as administrator, was correct.

The third error assigned is, that the court excluded the evidence that Baldwin was recognized as administrator of Branch by the County Court of Jefferson county.

The evidence so offered was a certified copy of an order of the county Judge to the effect that "it appearing to the court that the said Sturgis B. Baldwin has been acting as administrator of said estate since the 24th day of January, 1872, that such administration is ancillary, the principal administrator being in the State of Georgia; that the estate of the said Caswell W. Branch in this county and State is entirely exhausted and that he, the said Sturgis B. Baldwin, has fully discharged his duties as administrator in relation thereto; it is thereupon ordered and adjudged that the said administrator *ex officio* be, and he is hereby discharged as administrator of the estate aforesaid. Done and ordered in open court this 4th day of December, 1873."

The judge rejected this paper as evidence that Baldwin had been the administrator at the time the suit was instituted to recover the indebtedness of the deceased. The proper evidence of the fact sought to be proved is the letters of administration, or a copy of them, or of the order directing Baldwin as sheriff to take charge of and administer the estate, with proof that Baldwin was the sheriff. The paper offered did not show that he had ever been recognized as administrator until the date of the order discharging him. He may have been "acting" without authority and wrongfully, but under the statute he could not bind the estate unless he acted under the order of the court. The order itself does not show that he had ever appeared before the County Judge for any purpose, not even to obtain his discharge. With the records of the County Court at hand, it was not difficult to produce the order of the court authorizing him to take charge of the estate, if such order had been made. There was no error in rejecting the offered proof.

While I have thus considered the question presented upon the argument, it is due to the parties as well as to ourselves to make one or two suggestions. First, The plaintiff in the complaint has scarcely succeeded in alleging any title whatever to the lands, either in himself or in Branch, deceased, and but for the admission of Branch's title in the answer, I should have declined to consider the questions raised upon the exceptions. Second. The plaintiff in attempting to prove the judgment, introduced merely the clerk's memorandum of the default and the *ides consideratum*. This is not a "record of judgment." There was nothing to show the commencement of the suit, the service of process, the complaint or the character of the action. The judgment appeared to be entered by the clerk upon default in vacation, but whether this was valid or void we could not judge, and I had some difficulty in persuading myself to consider anything beyond this, for really no judgment was proven. The defendant and the judge, however, do not seem to have

questioned its sufficiency, yet we were called upon to determine as to its validity while the record fails to disclose its very existence. And while the parties have not interposed the appropriate objection to this kind of proceeding, I feel justified in offering this protest.

The judgment of the Circuit Court is affirmed.

R. E. ALEXANDER, ADMINISTRATRIX, AND OTHERS, APPELLANTS, VS. JAMES M. KILPATRICK, APPELLEE.

Judgment was recovered in 1868 against A., before the adoption of the present Constitution and exemption laws, and after this Constitution took effect an execution was issued upon the judgment and personal property levied upon of the value of $680, which was claimed by A. as exempt and released from levy. Afterwards the same property was again levied upon and A. died. The widow and heirs now claim the exemption. *Held,*

1. That the exemption cannot be allowed under the Constitution of 1868 to a greater amount than was allowed by the law of 1866 in force when the judgment was obtained.

2. That although the right of the heirs to claim an exemption after the death of the debtor was not expressly recognized by the law of 1866, yet it may be allowed under the Constitution of 1868, no right to subject the property so exempted having existed prior to the adoption of the Constitution of 1868, and therefore no right of the creditor being impaired by extending the exemption to the heirs.

Appeal from the Circuit Court of the Second Judicial Circuit for Jefferson county.

The opinion of the court contains a statement of the case.

S. Pasco for Appellants.

The appellant claims, 1, a homestead or exemption under

the Constitution of 1868 and the laws thereunder, (Bush's Dig. 328-30,) as allotted to her husband in his lifetime; or if those proceedings are void, as alleged, the exemptions allowed under the act of January 16th, 1866, or under whatever other act is in force governing such cases, (Thomp. Dig., 185, 186, 201;) 2, her dower, her year's support for herself and family, and the allowance made to widows in cases where estates are insolvent; 3, the right as administratrix to settle her husband's estate under the law of 1853, (Bush's Dig., 55-7,) without interference from the sheriff by virtue of an execution.

In support of these claims, the following propositions are submitted:

1. The proceedings under the homestead and exemption laws (Bush's Dig., 330, sec. 16) cannot be attacked collaterally. The remedy is by bill in equity.

2. If the said proceedings can be here attacked, it is urged that the present case does not fall under the general rule as laid down in Gunn vs. Barry, 15 Wall., 610, but see 623. 1 How. U. S., 315-16; 4 Wall., 553; Cooley's Con. Lim., 287-8, and cases there cited. Nearly all of the property would have been exempt under the law of 1866, (Bush's Dig., 326-8,) and the appellee had at the time of the adoption of the present Constitution no proper lien, by virtue of his execution, upon any of the property included in the levy of the sheriff and the return of the commissioners. The two mules, it is admitted, were acquired after that time by the intestate; the corn being an annual product must have been raised since then, and the rest of the property was exempt under the law of 1866. 5 Kan., 239, 247; 9 Ib., 466, 475; 25 Ill., 221-23; 21 Ib., 104-5.

3. If these exemption proceedings were void under the statute of 1869, they were good under the statute of 1866, (Bush's Dig., 326,) and in either case the title of the property in dispute was preserved in the claimant, Alexander, in full force as long as he lived.

The law of 1866 was substantially complied with, and the intestate or the officer made a mistake as to the remedy it could have been corrected at any time before an actual sale, and the widow and orphans should have the same advantage as if it had been corrected, for equity will regard that as done which ought to have been done. The steps taken in the exemption proceedings were all prior to the levy under which the appellee now claims, and the levy should be subject thereto. 1 Cooley (Mich.,) 369; 3 Ib., 488, and cases there cited.

4. Upon the death of the said claimant of exemptions, the widow's rights and claims under the statutes relating to the settlement of estates have preference over all others.

The widow claims the following as her proper allowances for herself and children:

In all cases where the estate shall be insolvent, property to the appraised value of two hundred dollars, in addition to her implements of industry, clothes, &c. Bush's Dig., 55, sec. 23.

One year's provision for herself and family. Bush's Dig., 294, sec. 8.

One-third part in fee simple in the personal estate of her late husband, or a child's part in lieu thereof as dower. Bush's Dig., 293, sec. 2.

These claims are allowed to the widow by express provision of law. The first applies expressly to insolvent estates. The second is granted without any restriction and applies in all cases, whether the estate is solvent or not. It is a provision made by the supreme power of the State for the widow and orphan, suggested alike by a wise policy and the dictates of humanity. The third is a claim highly favored, as Lord Bacon says it is the common by-word in the law that the law favors three things, life, liberty and dower. Coke Litt., 31; Lamb. on Dow., 13, 138-9; 5 Fla., 354. The general rule is that the widow takes her dower discharged of all incumbrances created during the marriage

1 Bishop on Married Women, sec. 328. Under the common law it is even protected from distress for a debt due to the crown, the first in the order of payment under the common law. Lamb. on Dow., 82; 2 Bacon's Abr., Dower G., 387. Our own statute says that this claim "shall have preference over all others," (Thomp. Dig., 185, sec. 2,) and the judicial interpretation of this clause in the court of appeals of the territory of Florida gives the widow her one-third, "irrespective of the claims of creditors at large." Fla. Ct. of Appeals. Jan. T., 1834; Thomp. Dig., 185. And again, this court has declared that "the right of dower or dower interest of the widow in the personal estate of her husband are preferred rights; her claim stands higher than that of a creditor." 10 Fla., 284. The court further states "that the widow has an inchoate title to such personal property as the husband might die possessed of." Ib., 286. This view is sustained by other authorities, and it is ruled that "her dower is not derived out of the heir's estate, nor supported by it, but out of the estate of the husband continued by fiction of law after his death." 1 Bish. on Mar. Wom., 239, 355; Hayw. N. C., 188-9. The law of 1864 is not referred to in support of the widow's allowances, because that grants certain specific property in kind. It shows, however, the kind intention of the law and the spirit of its policy. Bush's Dig., 293, sec. 5.

5. The allowance of the claim of the execution creditor against the widow and administratrix will disturb the order of priorities as laid down by the statutes and the authority of the administratrix over the estate of her intestate.

The law as explained by a decision of the court (11 Fla., 111) has established the following order for the payment of debts where an intestate is insolvent: 1, Expenses of administration. 2, Funeral expenses. 3. All other claims pro rata, except that all liens created during the lifetime of the decedent are to be respected. Bush's Dig., 56, sec. 28.

In 11 Fla., 111, 124, the court favored the idea that l created in the lifetime of the decedent are to be paid w out reference to the preferred claims, but there the p was not before the court and does not seem to have l considered, and there was no necessity for deciding question. It is now respectfully urged that the law of 1 lays down a positive rule, and though the liens create the life time of a decedent are to be recognized, they r under this rule be subordinate to the two classes of cl which are preferred. The execution creditor should bound by the act of 1853, as well as all other creditors. has to comply with the statute (Bush's Dig., 63, sec. 19) quiring the presentation of claims within two years. cannot coerce his claim until six months after the decede death, and why is he not affected by all other statutes u the same subject? In the words of a recent decision of court, (13 Fla., 618-19,) "there can be no shadow of r rant or authority for directing the assets of an insolvent tate to be handed over to one or more creditors, to the clusion of all others." The whole estate must be distrib under the statute, not merely the portion remaining a the satisfaction of the liens. The administrator's oath bond cover the entire estate, regardless of the liens, and law must intend that he shall administer the whole est but if the sheriff can seize a part under an execution, h pro tanto the administrator, the jurisdiction is divided confusion and embarrassment must often be the result. this case it is admitted that if the lien of the execution vails, the funeral charges and costs of administration ca be paid out of the decedent's estate.

The only argument urged in the court below against position was that the levy of the execution in the lifet of the intestate "changed the property." 29 Car. 2, c 3, sec. 16. The common law of England is here in forc regard to executions. 2 Bacon's Abr., 74, tit. Executior 2 Tidd's Prac., 1038. Under it a lien is acquired by

creditor as soon as it goes into the sheriff's hands, but there is no change in the property until "execution executed," which includes levy and sale. 5 Fla., 278; 2 Ib., 438; 11 Ib., 123; 4 Ib., 134. The levy is only a preliminary step necessary to the final completion of the work, but the property still remains the defendant's until after the sale; his title is not divested till then. 3 Howard's U. S., 119; 5 Dana, 274. This view is upheld by the highest authority elsewhere, and is declared to be the law in the State, and if so the property was a part of Alexander's estate at the time of his decease and is subject to the dower claim of his widow. 2 Fla., 438-9. A statutory lien is declared to be as binding as a mortgage, (12 Wheat., 177,) but surely it is not more so; and if the intestate had mortgaged the property to the appellee in his lifetime, the widow's rights would not be barred unless she had joined in the mortgage. Foreclosure and sale of mortgaged personal property in the lifetime of the mortgagor can alone bar the widow's rights of dower after his decease. Bush's Dig., 611-12. The cases which sustain apparently a different view in regard to the force of the execution have, we urge, originated from a misconception of the meaning of the word levy as used by the older writers. It includes with them the seizure and sale of the property. To levy an execution is defined, (2 Bouv. Law Dic., 34,) to raise or levy so much money on execution. Later writers generally use it as including simply the seizure.

But if it is claimed that the levy has extinguished the debt, and that the same ought not, therefore, to be disturbed, we reply that the record shows a prior levy upon five bales of cotton, and if a levy satisfies a writ the appellee has no authority for any further proceedings after dismissing his levy upon the cotton, which the record shows was done by the execution creditor.

A recent decision of the Supreme Court of Georgia, not yet reported, in a case resembling the present, lays down

the following rule: "Where a homestead was set apart under the act of 1868, and was afterwards levied on to satisfy a *fi. fa.* founded on a debt contracted before 1868, the husband, or on his failure the wife, may apply for an exemption under the law as it stood before the debt was contracted, and the exemption, if obtained before the sale under the levy, is a valid exemption against the judgment so levying."

A. L. Woodward, Sr., on the same side.

I. The question before the courts is not as to the constitutional exercise of legislative power over the subject-matter of exemption of a debtor's property, but as to the abuse of the power. 2 Minn., 89, 90, 95, 97, 102; 11 N. Y., (1 Kern.) 281.

Courts are always liberal in the construction of exemption laws, in accordance with their spirit, to secure to their beneficiaries the enjoyment of the right to the property exempted. 7 Texas, 13, 19-22; 18 Ill., 194-9; 21 Ib., 178.

The exemption act of 1866 is still in force, and not superseded by the Constitution, Art. X. Exclusively in view of future contracts, and eminently conservative in its spirit, it guards with scrupulous care all vested rights and antecedent obligations. Bush's Dig., 328, sec. 7, and 330, sec. 18.

Its validity, clear and unquestionable, is sustained by the highest authority. 1 How., 311.

The recent decision of the Supreme Court of the United States, in the case of Gunn vs. Barry, (15 Wall., 593,) would not affect appellant's claim under the act of 1866, though held fatal to her husband's by the circuit court under the Constitution of 1868, yet, it is submitted, at least doubtfully applicable even there. 1. The decision, assuming the premises, blends the remedy with the obligation. 2. There the law was invoked in exemption of a homestead of great value against a prior judgment creating a lien. 3. The act, an-

ticipating the decision, is based upon its principles. Two things, each equal to a third, are equal to one another.

II. The act of 1866 vests in every actual housekeeper the right of exemption to property of limited amount, and extends it to the widow and infant children of the owner, Bush's Dig., 326, sec. 2, and 329, sec. 13.

This right may be asserted by the widow, either in consummation of a proceeding instituted by her husband in his lifetime, or one *de novo* of her own.

Dower is no bar to the widow's right of exemption in the property of the estate as against creditors, and here the interests of the widow and the heirs concur. 41 Ala., 627; 42 Ib., 315.

Nor does exemption exclude the widow's rights under pre-existing laws as to the administration of estates. The right of exemption is distinct and independent in its subject-matter. It relates to property *eo nomine, per se,* and has no reference to allowances under other laws, which it neither supersedes nor includes, being essentially remedial and cumulative in its character.

A party has the right to amend his petition to allege a new fact in support of his claim to exemption, even after trial and verdict against him. 45 Ga. 552.

So a party may amend his petition, claiming enlarged exemption under a new law. 45 Ala., 126-34. And, *e converso,* failing under the new law, may he resort to the old, standing on the same subject-matter unrepealed.

Nor is the right of exemption lost by the repeal of the law, where proceedings have been taken under it.

And when the new law has been declared invalid by judicial authority, surely a party claiming under it may prosecute his claim under a former law still subsisting and in force.

The right of exemption is not lost by levy on property exempted, though the claimant may have neglected or re-

fused to make the selection before. Bush's Dig., 329, sec. 14; 42 Ala., 295.

It is, therefore, respectfully submitted whether it be not still competent to appellant to prosecute her claim to exemption in this estate under the act of 1866 on the subject, this court remanding the cause with appropriate instructions; or whether the court will not give such decree in the premises as the court below ought to have rendered.

Scott & Clarke for Appellee.

1st. It is contended by appellants that the widow is entitled to her dower or share in the personal property levied on, and to a year's support out of the same for herself and minor children, or $200 worth of said property, the estate having been declared insolvent. The first is claimed under section 2 of act of November 7, 1828, Bush, 293. The second under sections 14 and 15 of act of November 20, 1828, Bush, 54 and 5. By an examination of these acts it will be seen that these allowances are made out of the property of which the husband dies seized and possessed, and which comes to the hands of the administrator to be administered. The sheriff having levied upon the property, Alexander was disseized and not entitled to the possession of the property at the time of his death. The sheriff held it in trust to satisfy the judgment of Kilpatrick. The property was altered by the levy and Alexander had no control over it. In support of this position I cite 4 Fla., 134; 1 How., (Miss.) R., 42; 4 Mass., 402. The property becomes changed after execution executed or levied. 3 Bacon's Abridgment, 705; 1 Wash. C. C. R., 37; 1 Pet., 441. After goods are seized by a sheriff he may maintain trespass or trover. Sewell on Sheriffs, 252. The widow as the administratrix stands in the place of the intestate and is substituted for him. 1 Williams on Ex's, 406. If her intestate could not claim possession of this property neither can she as his representative.

2d. It is also contended that Alexander in his life-time

claimed an exemption, and that the claim and proceedings were a substantial compliance with the statute of 1866, and exempted this property under that act. The return of the sheriff on the execution, shows that the claim was under the Constitution of 1868, and the statute of 1869. The act of January 16, 1866, (see pamph. 44, 45 and 46, sections 1 to 7,) requires the defendant in execution as a condition precedent to claiming the exemption provided for, "to make affidavit and establish by sufficient testimony that he has made a faithful and complete statement of all his property in trust or otherwise," &c., &c. And that "three disinterested house-keepers shall value the property, which valuation shall be sworn to and signed by them." The record does not show that this or any part of it was done. But it *does* show, that Alexander claimed $680 worth of personal property as exempt, when he was entitled at most to only $300 worth under the act of 1866, thereby showing conclusively that the claim was made and intended to be made under a law providing for a larger exemption—the statute of 1869. But even if the proceedings taken should have entitled him to the benefit of the exemption allowed under the statute of 1866, still it appears there would remain, after allowing the exemption when it was claimed, sufficient property to satisfy Kilpatrick's judgment, it being less than $300, and there being $680 worth of property.

3d. It is contended by appellant that this property is exempt under the Constitution of 1868 and statute of 1869. The record shows that the judgment was entered, the execution issued and placed in the hands of the sheriff prior to the adoption of the Constitution of 1868. Such being the case, we understand it to be well settled that our State Constitution and the statute of 1869, in pursuance thereof, so far as they provide for an increased exemption of property from liability for contracts entered into, and liens acquired to the adoption of said Constitution, are void

as being in conflict with the section of the Constitution prohibiting any State from enacting a law impairing the obligation of contracts. In support of this we cite 15 Wall., 610; 16 ib., 314; 16 ib., 678; 13 ib., 646; 4 ib., 535.

RANDALL, C. J., delivered the opinion of the Court.

This was a case submitted "without action" under the provisions of the Code, (section 308,) to the Circuit Court for Jefferson county:

Kilpatrick claims that all the personal property of a defendant is liable to be levied upon by virtue of an execution issued upon a judgment rendered in April, 1868, while the exemption act of 1866 was in force, and before the adoption of the more liberal exemption in the Constitution of 1868. Mrs. Alexander, as administratrix, and in behalf of herself as the widow, and in behalf of her children, heirs of the now deceased debtor, claims, 1—that sheis entitled to administer the property so levied on; 2—that she and the children as heirs are entitled to an exemption of the property under the Constitution of 1868, or, if not, then under the act of 1866.

It has been held in several cases by the Supreme Court of the United States, and very pointedly in the recent case of Gunn vs. Barry, 15 Wallace, 610, that the remedy provided by law at the time of making a contract enters into and forms a part of the contract,and that no State has the right to impair the remedy by a sweeping exemption, as that would impair the obligation of the contract.

In the case at bar the plaintiff had his judgment before the Constitution of 1868, and was therefore entitled to make his money out of any property not exempted under the law of 1866. The provisions of the State Constitution, therefore, as they would exempt all the property of the judgment debtor, are in violation of the Constitution of the United States so far as they seem to extend the more liberal exemption.

property from levy and sale upon a judgment obtained before its adoption.

The Constitution of 1868, and the acts of the legislature on the subject of exempting property from levy and sale under execution, do not, either expressly or by implication, repeal the law of 1866, which confers a more limited exemption, for we cannot infer that it was the intention of the legislature to abrogate all right to claim an exemption as to then existing indebtedness, unless they expressly so declare, which they have failed to do. The Constitution of 1868 intended to enlarge the privilege of claiming exemptions and not to deprive parties of it where it already existed in a more limited provision. The defendant in exeeution had, therefore, in his life-time,a right to claim the benefit of the exemptions allowed by the law of 1866, Chapter 1481.

But it is claimed that the defendant in the execution did not comply fully with the law of 1866, and therefore was not entitled to its benefits. It is true that he did not comply with that law as strictly as he might have done, but it seems that he did claim an exemption in substantial form; made oath to an inventory of "the whole of his personal property;" that it was appraised by three disinterested persons selected by the sheriff, and the sheriff then released the property as exempt from levy. What more could be required of the defendant after his object was accomplished?

After the levy was discharged, the sheriff again levied upon it or the greater part of it, and within ten days thereafter the defendant died without having *again* claimed an exemption.

But whether the proceeding in the first instance was, or was not, a strict compliance with the requirements of the law, we do not think the widow and heirs of the defendant are deprived of the right to claim the exemptions allowed by the act of 1866. It may be said that by that law the right to claim an exemption in personalty did not survive to the heirs. This is true if that act stands alone, but we are at

liberty to extend the right to them by the third section of the ninth article of the Constitution of 1868, which provides that "the exemptions provided for in sections 1 and 2 of this article shall accrue to the heirs of the party having enjoyed or taken the benefit of such exemption." The first section included and enlarged the exemption provided in the act of 1866, and though we cannot allow the enlarged exemption, as before said, yet we can extend it to the family of the defendant without infringing the rule of the inviolability of the remedy. When the judgment was recovered it did not bind the defendant's personal property which he might claim as exempt, and a legislative act extending the same exemption to the heirs would deprive him of no remedy which he had possessed and no right he had acquired. And in consideration of the humane, as well as the lawful purpose and intent of the framers of the Constitution and laws in reference to the subject, we are of the opinion that the heirs of the defendant in the execution may now claim such exemption as the defendant had "enjoyed or taken" in his life-time.

The claim of Mrs. Alexander as administratrix cannot be sustained. The property having been levied upon and being in the hands of the sheriff, must be subjected to the payment of the execution, except so far as it may be exempt on claim of the heirs of the defendant. The death of the debtor does not change the status of the property levied upon.

The order of the Circuit Court subjecting all the property in question to sale by virtue of the execution, notwithstand- the exemption claimed under the law of 1866, is reversed.

DECISIONS

OF THE

Supreme Court of Florida.

APRIL TERM, 1874.

J. M. RICHARDSON, APPELLANT, VS. JOSEPH T. RUSS, APPELLEE.

1. The report of the findings of facts by a referee, being in the nature of a special verdict, this court will not disturb such findings when they are supported by evidence, the referee being the judge of the weight of the evidence and the credibility of the witnesses.

2. The referee is the judge of the sufficiency of the impeachment of a witness and the extent to which his credibility may have been impaired, in like manner as he is the judge of the other facts.

3. Negligence is a question of fact, also, for the referee to determine upon all the evidence in the cause relating thereto.

Appeal from the Circuit Court of the First Judicial Circuit for Jackson county.

A statement of the case is contained in the opinion of the court.

G. S. Hawkins and *A. H. Bush* for Appellant.

J. F. McClellan for Appellee.

FRASER, J., delivered the opinion of the court.

This suit was brought by the plaintiff in the court below to recover several sums of money, claimed to be due him from the defendant on promissory notes, for money paid,

for goods sold, and for plaintiff's share in the results of an adventure by the parties in farming, the plaintiff claiming $4,682.34.

The defendant denied a portion of plaintiff's claim, set up set-offs in a large amount, and set up also as a defence fraud and negligence on the part of the plaintiff in the conduct of the adventure.

In December, 1868, the defendant on the one part, and plaintiff and plaintiff's father on the other, entered into an agreement for the cultivation of defendant's plantation for the season of 1869. The defendant was to furnish the use of the land as an equivalent in value to the services of the Richardsons, who were to oversee and manage the business. The expenses of cultivation and supplies were to be equally borne by the parties and the products equally divided.

After some time had elapsed and some considerable expenditures had been made, the elder Richardson died, and it was agreed that the adventure should be continued the same as though the contract had been originally made between the defendant and the plaintiff alone.

In pursuance of this last arrangement, the plaintiff continued to manage the business until the crops were secured, the major part of which was thirty-five bales of cotton, which went into the hands of defendant, were sent by him to market, sold, and the proceeds received by him.

The cause was tried by a referee, on the trial of which both parties were witnesses and told their stories as they respectively understood the facts. Their statements are in many respects flat contradictions. Many other witnesses were also sworn and testified for the respective parties.

The testimony is voluminous, and we do not deem it necessary to go over it, or to refer to it except so far as we may do so incidentally in commenting upon the report of the referee.

It is proper, however, here to remark that there is no item of the accounts of the parties, presented to the referee

and allowed by him in whole or in part, without some evidence to sustain it.

After fully considering the evidence, and giving such weight to it as in his judgment seems right, the referee reports that the plaintiff is entitled to a judgment against the defendant of $1,075.17.

In arriving at this conclusion, the referee first adjusts the accounts between the parties individually, allowing plaintiff items of his account amounting to $1,200 30
And in like maner to defendant, 922 93

Showing balance due plaintiff of $ 277 39

He then adjusts the copartnership accounts, and finds that the defendant has furnished the copartnership, for carrying on its business, sundry items, amounting in all to $3,601.53, and allows him a credit for one-half this amount, $1,800.76. He finds, also, that plaintiff has furnished the copartnership, for like purpose, items amounting in the aggregate to $1,751.24 and allows him a like credit of one-half, $875.62, showing a balance in favor of defendant on this branch of the account of $925.14.

The referee further finds that the defendant has received of the products of the business, $3,896.99, with half of which he charges him, $1,948.49; and that plaintiff has received also of such products, $405.18, with half of which he charges him, $202.59, showing a balance due plaintiff on this branch of the account of $1,745.90.

So that a recapitulation of the statement of the account by the referee will show—

Bal. due plaintiff in the individual account of $ 277.39
Bal. due plaintiff from products of business, 1,745.90

Total, $2,023.29
Am't due defendant, excess of advancements 925.14

Showing a balance in favor of plaintiff of $1,098.15

This corresponds with the result found by the referee in the account stated by him, and yet the judgment was rendered on the report of the referee for $1,075.17 only. How this discrepancy occurred is not explained. But this is an error of which the appellant cannot complain, and as the plaintiff has not taken the proper steps to have the correction made in the court below, it is not proper that we should make the correction now.

The defendant appeals from the judgment of the court below, and makes fourteen assignments of error. The first twelve are simply to findings of matters of fact from the evidence before the referee, and to the allowance and disallowance of items of account depending upon the testimony in the cause.

The report of the findings of facts by the referee, being in the nature of a special verdict, this court will not disturb such findings when they are supported by evidence, the referee being the judge of the weight of the evidence and the credibility of the witnesses. This rule has been repeatedly recognized by this court.

The thirteenth assignment is, that the referee erred in not giving credit to the testimony of the defendant, in disregard of that of the plaintiff, whenever there was conflict between them. We do not see upon what principle this assignment rests. The parties, as witnesses, stand upon equal grounds, and, as witnesses, are entitled to equal credit; and if one, or the other, stands impeached generally as to character, or particularly by contradictory testimony, or contradictory statements of his own, the referee is the judge of the sufficiency of the impeachment, and the extent to which his credibility may have been impaired, in like manner as he is the judge of the other facts.

The fourteenth error complained of is, that the referee did not charge the plaintiff with damages for negligence in the management of the copartnership business and in the expenditures made.

Negligence is a question of fact, also, for the referee to determine, upon all the evidence in the cause relating to the subject, and upon the evidence he has determined it in favor of the plaintiff, and upon the principle already stated this finding will not be disturbed by this court.

This disposes of all the errors assigned. And we do not see that the referee has erred in any of the findings, and of the statement of the accounts between the parties the appellant has no reason to complain.

Judgment affirmed and the cause remanded.

ALVIN MAY AND ANDREW M. SLOAN, APPELLANTS, VS. ROBERT H. GAMBLE, APPELLEE.

1. A bond executed by the plaintiff and two sureties upon the issuing of a writ of attachment, in double the amount of the debt or sum demanded, is "good and sufficient" if approved by the clerk issuing the same, though each of the sureties is not good for more than one half the penalty of the bond, if both together are worth double the amount of the debt sued for.

2. Where the charge of a judge to a jury embraces several propositions of law, or of law and fact, a general exception to the whole charge as erroneous is not a proper exception unless the whole scope of the charge is bad. A separate exception to each item of the charge objected to is contemplated by the rules.

3. Even though it be shown that there has been a mistake in the directions of the court to the jury, or the charge not as specific as might be thought proper, yet if it be upon a point on which justice has been done, or the mistake or omission could not have produced a different verdict, a new trial will not be granted.

4. Giving a note for an antecedent debt is not a payment of it, unless the note be received under an express agreement, or under circumstances from which an agreement may be fairly implied to treat it as a payment, or unless payment in fact result from it.

5. An agreement by a debtor and creditor that the creditor will, at a future day, accept new notes and securities in lieu of those held, giving additional time of payment of the indebtedness, cannot be enforced unless some valid consideration be received by, or benefit or advantage has accrued thereby, to the creditor.

Appeal from the Circuit Court, Second Judicial Circuit, for Jefferson County.

The opinion of the Court contains a statement of the case.

S. Pasco for Appellants.

The first error brought to the attention of the court relates to the attachment bond.

The defendant Sloan, by his counsel, moved to dissolve the attachment because of the insufficiency of the bond; 1st, there appearing on the face of the bond on file only one good and sufficient security instead of two as required by the statute, and, 2d, the sureties upon the bond being worth less than the amount required by statute. The bond is in the usual form, and two persons have signed their names as sureties, and each has sworn that he is worth the amount of the debt, that is one-half of the penalty of the bond. The statute (Thomp. Dig., 368, p. 4,) requires sureties in at least double the debt, and two in number; that is, if the addition of the word two has any force, it requires two persons, each of whom is worth double the debt or sum demanded, and this requirement is certainly not complied with by causing two persons, each of whom is worth only the debt or sum demanded, to sign the bond. This would seem too plain for argument. The court below urged that the sufficiency of the bond was determined by the Clerk, and that the court had no supervision over his action in the matter, and the defendant's remedy for any deficiency was by action upon the Clerk's bond. To this we reply—1st, that the remedy cannot be by action against the Clerk upon his official bond, because the law only requires a bond of the Clerk in the penalty of two thousand dollars, (Th. Dig., 59, sec. 1, p. 2,

and in the present case the deficiency would be more than double that amount, so that this responsibility was not contemplated by the legislative power. 2d, That the court by analogy has the same authority to supervise the action of the Clerk in regard to the sufficiency of the bond that it has to judge of the regularity and sufficiency of the affidavit. This authority has been repeatedly exercised under a clause of the statute without question. Th. Dig. 369, sec. 3, p. 3. 3d, That this court has recognized the authority of the judge to examine into the sufficiency of the bond. 7 Fla., 336; 11 Fla., 127; 12 Fla., 144; ib. 628. And 4th, That under the statute no authority is vested in the Clerk or any other officer to approve the bond.

The plaintiff's counsel argued that the motion must be denied because the court could only consider upon the motion facts and matters appearing upon the face of the proceedings. This objection if valid might apply to the second ground upon which the defendants moved, but it could have no application to the first, for the insufficiency of the bond does appear upon its face. Plaintiff placed the proof of it there himself, and must accept the consequences, but if it had not been there the court should have admitted testimony as to the sufficiency of the security under the second ground of objection. The law requires no proof of the pecuniary ability of the parties upon the bond, but as the plaintiff has given it voluntarily he must be bound by it. The very words of the law recognize the principle contended for that the court has the supervisory power. It declares that the bond though defective shall not be adjudged void "although the attachment be dissolved by reason thereof"—i. e. its informality, (Thom. Dig. 368, p. 4.) If the two sureties, each good according to the affidavit for half the required amount, constitute one good and sufficient surety, as reason and precedent indicate, then the point here urged is settled by the case referred to in the seventh volume of our State Reports,

(Roulhac vs. Rigby,) already cited. In the only case cited by plaintiff's counsel, (Proskey vs. West, 8 S. & M., 711,) the matter of defect was not apparent on the face of the proceedings, and it will be borne in mind that in Mississippi, where this decision was rendered, a defendant in attachment is not even permitted to contest the proof of the affidavit as in this State. 10 S. & M., 518.

The general authority of the court in this matter is recognized in Drake on Attachment, sec. 124, and cases are there cited in support of the authority, and these authorities are in harmony with the decisions this court has made whenever the matter has come up for consideration. 4. Humph., 311; 12 S. & M., 514.

The second and third matters assigned as errors relate to the third ground upon which the defendant Sloan moved to dissolve the attachment. The indebtedness was denied, and upon the issue thus raised and tendered the parties went to trial before the court, neither calling for a jury. The issues raised at the subsequent trial before the jury upon the pleas were substantially the same as in the trial before the court of the question of indebtedness under attachment proceedings, and the same testimony with but little variation was introduced at both trials; so to save repetition, the matters of law this appellate court is called upon to review will be considered *seriatim,* without reference to the particular trial at which they arose.

These matters of law arise upon the question of the substitution of one contract in settlement or satisfaction of a previous contract.

The facts as brought out at the trial are briefly these: Gamble sells land to May, Sloan becomes May's surety. After the payment of a large part of the purchase money, Sloan proposes a new bargain and agreement in regard to the land, proposing to become the purchaser himself. May assents, and Gamble accedes to it and receives two thousand dollars in money upon it. Sloan, upon the faith of the new

bargain in which he is principal, substituted in lieu of the original bargain in which he was surety; pays May seven thousand eight hundred dollars or more; performs punctually every condition precedent, and stands faithfully to the compact until Gamble fails to perform certain conditions it requires of him. Gamble then falls back upon the old bargain, claiming the right so to do because he has obtained no additional advantage or consideration from it, and for other reasons appearing in the record, and now seeks to be released from the new or substituted bargain. If the old agreement is still in force he can recover in this action; if the new agreement can be substituted he must fail, provided the attachment is sustained.

The questions of law raised on the trial and included in the assignment of errors are as follows:

1st. The defendants, under the plea of payment, attempted to sustain the new agreement or contract. The court in its charge to the jury says the first plea is "payment;" under this "it is incumbent upon the defendant to prove that he paid the notes sued upon; this must either be in money, or if by other notes, he must show that they have been paid." The last clause requiring proof of the payment of the notes alleged to have been given in payment of the former notes, is one of the errors assigned..

This can hardly be considered as an open question after the decision delivered by Ch. J. Marshall in Sheehy vs. Mandeville and Jamesson, (6 Cranch, 253.) The counsel for plaintiff in that case in his argument used almost the same words as the judge in his charge in the case at bar, but the court says: "This principle appears to be well settled. The note of one of the parties or of a third person may, by agreement, be received in payment. The doctrine of *nudum pactum* does not apply to such a case; for a man may, if such be his will, discharge his debtor without any consideration." 6 Cranch, 264; 1 M. & W., 153; 2 M. & W., 20; 4 J. J.

Marh., 3; 2 Greenleaf on Ev., secs. 520, 523; Keer's Action at Law, *6; 1 Saun. Pl. and Ev., 29.

2d. The defendants attempted, under the plea of Accord, to sustain the new agreement. The court charged the jury that "a new contract to have the effect of discharging a former debt by accord and satisfaction, must be fully executed."

As the defendant had only attempted to show that he had performed his part of the contract until a breach of it by the plaintiff, and to show that the new contract was accepted in satisfaction of the old before its execution and without reference to its execution, the effect of this charge was to deprive him of the benefit of his evidence introduced in support of this plea.

The court in its charge excludes the consideration of a large class of cases where a promise is received in satisfaction without regard to its ultimate performance, and looking to the remedy provided by law for the enforcement of the new promise. Notes to Cutler vs. Powell, 2 Smith's L. C., 10. "An accord with mutual promises to perform is good, though the thing be not performed at the time of action." 2 B. & Ad., 328. "Where the promise on one side is the consideration for that on the other, performance is not a condition precedent to the right of action." Notes to Cumber vs. Ware, 1 Smith's L. C., 253 or *150.

All that is requisite upon this head to make a good acco[illegible] is "it must be complete—that is, everything must be do[illegible] which the party undertakes to do. * * The debtor will be [illegible] quired only to execute the new contract to that point wher[illegible] it was to operate a satisfaction of the pre-existing liabilit[illegible] 1 Bouv. Law Dict., (12th ed.,) 53—Accord, 2, 3; 2 Parso[illegible] on Cont., *195, n.; Language of J. Redfield in Babcock [illegible] Hawkins, 23 Vt., 561; 2 Greenf. on Ev., sec. 31; 3 Joh[illegible] Cas., N. Y., 243. (This case is overruled by Russell [illegible] Lyttle, 6 Wend., 390, according to Greenf., Over-ruled C[illegible] ses, 101, but the same author says that Russell vs. Ly[illegible] was decided on the earlier authorities. 2 Greenf. on E[illegible]

sec. 31, n. 4.) 1 Gray, 245, 249; 16 Johns., 86; 3 Watts & Serg., 277.

3d. The defendant set up the same defence substantially by an equitable plea under the statute. The court virtually excludes this whole defence by charging the jury as follows: "An agreement to have the effect of discharging a former debt by the substitution of a new contract, must be formed upon a new consideration." The plea had set up no new consideration, and the plaintiff had admitted its sufficiency in law by filing a replication to it. The charge of the court then had the same effect as if the plea had been demurred to and the demurrer sustained.

The case of Sheehy vs. Mandeville, already cited, (6 Cranch, 264,) is sufficient to prove that a new consideration is not necessary to support a new contract taken in substitution or payment, or satisfaction of one already existing. 24 Conn., 613 and 620; 1 Wels. Hurls & Gor., (Exc.,) 601; 7 Md., 259. A promise is a good consideration for a promise. 8 Rich., S. C. (law,) 355; 1 Pars. on Con., 373; 8 Rich., S. C., (law,) 416; 19 Barbour, (N. Y.) 428; 5 Tex., 512; Smith on Cont., 191 or *115, n., cases there cited; 2 Pars. on Con., *194.

"A rescission may be effected either by a novation—that is, the entering into a contract, which takes the place of and puts an end to the original one—or by a mere agreement to rescind." Fry on Sp. Perf. of Con., 399 or *301. The extinction of the prior debt is consideration enough to support a novation. 1 Pars. on Con.,*190; 25 Pa.State, (1 Carey) 481.

The question is not one of consideration; it is of bargain and agreement. If the minds of all the parties met and so agreed, the original contract could have been annulled at any time, even if no new sale of the land had been made. There was no legal obstacle in the way and it was a mere question of evidence whether the parties did agree as the defendants allege.

4th. In the motion for a new trial upon behalf of Sloan,

before the judge in the attachment proceedings, error was alleged in this, "that the plaintiff is declared not to be bound by his new contract upon the ground that there was no additional consideration for the same, although it appeared in evidence upon the trial that it had been partly executed."

It is well settled that a parol contract which could not be enforced under the statute of frauds, because it was not in writing, cannot be avoided by one who has received the whole or a part performance of the agreement. 1 Des. (S.C.) 350; 1 Black., (Ind.,) 58.

Gamble admits that part of the purchase money was paid by Sloan under the new agreement, and the court has so found. And he cannot under any pretence avoid his bargain while retaining its benefits. Maxim—*"Qui sentit commodum, sentire debet et onus."* 2 Bouv. Inst., n., 1,433; 1 East, *449; 2 Parsons on Con., *192, and cases there cited; 1 Metcalf, 550. If the plaintiff is relieved from his bargain because he does not perform his part of it, he receives a benefit from his own wrong.

5th. Again, error was alleged in this "that the said new contract is declared not binding upon plaintiff, (Gamble,) because it was a contract for the purchase of lands, without a memorandum in writing to support the same, although it appeared on the trial that part of the price of the lands had been paid by defendant (Sloan) to plaintiff, and that defendant had gone into possession of the lands under the said agreement, facts which would make it such a contract that a Court of Equity will enforce;" and although it appeared further that the deed and mortgage were subsequently executed, which made the new contract valid *ab initio,* if there was any original defect therein.

If this objection as to the memorandum in writing had been insisted upon by the opposing counsel, no notice

most invariably from the nature of things, precedes the memorandum; the *congregatio mentium* is generally thus reached, and if a deed is executed without any intervening memorandum, is the transaction invalid? Here there was part payment, followed by possession and execution of the deed, for Col. Gamble says it was executed, and Mr. Papy, who, as a lawyer, must have known the legal force of the word, testifies that it was executed. Execution of a deed includes delivery. 1 Bouv. Law. Dict., 553, Execute; and it is well settled that a delivery need not be manual. Smith on Cont., 56 or *7, and cases there cited, among them 5 B. & C., 671, 11 E. C. L. R. The deed having been executed, the grantor cannot contradict it. *"Nemo contra factum suum venire potest."* Coke 2d Inst., 66.

In recapitulation, we claim to have proved that the attachment should have been dissolved, 1st, because of the defect apparent upon the face of the bond, the court having jurisdiction to judge of such defects, the plaintiff affording the proof thereof himself, and the defect being fatal under a former decision of this Court. 7 Fla., 336. 2d. Because the securities were not good and sufficient under the statute, and the defendant Sloan being ready to prove the same. 3d. The defendant Sloan was not indebted upon the cause of action sued upon, it having been paid and satisfied by the substitution and execution of a new agreement. If upon these grounds, or any of them, the attachment should have been dissolved, then the plaintiff has no footing in court against the defendant Sloan, for the writ was commenced against him by attachment and he did not plead to the declaration until after the court had refused to dissolve the attachment, denied the motion for a new trial and exceptions had been taken to the action of the court. "When any suit shall hereafter be commenced by attachment, and the same on motion be dissolved before plea to the action, then, in every such case, the suit shall abate and be dismissed from court." Thomp. Dig., 370, sec. 3, p. 5.

But if the attachment was properly sustained, we claim to have shown that the verdict of the jury should be set aside and a new trial granted, because the charge of the court misled the jury and prevented them from giving the defendants a verdict upon any of the issues raised, and thus deprived them entirely of the benefit of their testimony.

Papy & Raney for Appellee.

The appellants except to the rulings of the court below as well upon the trial of the motion to dissolve the attachment, as upon the trial of the main issues made by the pleadings.

Attachment.—The attachment is against the property of the defendant Sloan, he being a non-resident. Sloan moved to dissolve the attachment on the following grounds:

1st. Because there appears upon the attachment bond only one good and sufficient surety.

2d. Because the sureties on the attachment bond are not, "as Sloan is informed and believes, good and sufficient in at least double the sum demanded."

3d. Because the allegations of indebtedness made in the attachment affidavit are not true.

The fact is that the attachment bond is in more than double the sum demanded in the affidavit, and is in the form prescribed by law, having two sureties thereto.

To sustain the first and second grounds of the motion, the appellant, Sloan, relied upon the affidavits made by the sureties to the effect that they were respectively worth the sum of $5,250 over and above their liabilities and exemptions.

The court below was correct in overruling these grounds for the following reasons:

1st. Even admitting that the justification was necessary, (a practice never followed in this State except during the existence of the Code,) it shows sufficient sureties under the law. Thomp. Dig., 368, sec. 4.

2d. Admitting that each surety should be worth the

amount of the penalty of the bond (which in this case is $10,500) over and above his liabilities, the justifying affidavit does not establish nor imply that they were not, nor is there any evidence in the record that they were not worth this amount. The affidavit does not state that they were forth each *only* $5,250.

3d. The clerk is made by law the judge of the sufficiency of the sureties, and when the bond is proper in form, his decision cannot, in a case like the present, be inquired into. It is a matter to be decided by him before the writ issues. Thomp. Dig., 367, sec. 1, 368, sec. 4; Drake on Attachment, sec. 145; 8 S. & M., 711.

The third ground for dissolving the attachment urged by the appellant, Sloan, is governed by the principles of law discussed hereafter in connection with the issue made upon the second and third pleas of the appellants.

Main Issues.—The first plea is, payment.

The action is brought to recover a balance remaining unpaid on the promissory notes sued on, and the declaration specifically states and admits what payments have been made. There is no testimony in the record supporting the plea, so we do not discuss it.

The second and third pleas are pleas in the nature of accord and satisfaction.

Upon the issue joined on the second plea of the appellants, it was incumbent upon them to show that the respondent received from them the notes and drafts mentioned in the plea in lieu of the notes sued upon and in discharge thereof. And under the issue joined upon the third plea, appellants were required to show that the respondent entered into a new agreement in regard to the lands, in part payment of which the notes sued upon were given, and that by the terms of this agreement the respondent accepted the appellant Sloan as the purchaser of the land in lieu of the appellant May, and accepted in payment and satisfaction of the outstanding notes originally given by said May and

Sloan (of which the notes sued on are two) the drafts a[illegible]d notes recited in the second plea, the notes being secured [illegible]by mortgage as therein stated. If the new agreement set [illegible]up was without consideration, and was not executed, the p[illegible]r-formance thereof by the respondent was not obligatory up[illegible]on him, but *"nudum pactum."* This plea is made as an eq[illegible]ui-table plea, but the testimony does not support it, nor sh[illegible]ow any legal or equitable defence.

The principles of law by which the verdict on the seco[illegible]nd and third issues, and the decision on the third ground [illegible]for dissolving the attachment, are to be considered, are th[illegible]se generally governing all pleas of accord and satisfaction a[illegible]nd are as follows:

Accord must be executed.

Accord is a satisfaction agreed upon between the pa[illegible]rty injuring and the party injured, which, when *performed* is a bar to all actions upon that account. 3 Black. Com., m. p. 15.

The mere consent of the party to accept a satisfacti[illegible]on, without an actual satisfaction, is not sufficient to discha[illegible]ge the other. The accord and satisfaction must be perfe[illegible]tly complete and executed. 3 Black Com., m. p. 15 and n. [illegible]2; 1 Saund. P. & E., 26.

Part execution, or readiness to perform or tender of p[illegible]er-formance, not sufficient.

An accord must be completely executed before it can p[illegible]ro-duce any legal obligation or effect, and part execution of the accord and tender of the residue is insufficient. Sau[illegible]nd. P. & E., title Accord & S., m. p. 29-27.

Part payment and an agreement to take the residue a[illegible]t a future day, cannot be plead as satisfaction in bar. 6 We[illegible]d., 391-2; 20 Conn., 559.

Where there is an agreement to pay or deliver money or goods, it is not sufficient to show that the person plead[illegible]ing it has always been ready to pay or deliver, or even a ten[illegible]der and refusal, but an actual acceptance thereof by the pl[illegible]in-

tiff must be proved. Saund. P. & E., ib. 29; 2 Bibb., 404; Ib., 25; 6 Wend., 390; 23 Ib., 342; 19 Ib., 516; 7 Blackf., 582.

Must be given and accepted in satisfaction.

Delivery must be proved unless not denied, and delivery must be proved to be *in satisfaction.* 1 Saund. P. & E., m. p. 26.

To show that the accord and satisfaction were simultaneous, and consisted of the delivery of a certain thing, it must be proved not only that it was delivered, but that it was deemed in satisfaction. 2 Par. on Con., 199; 1 Wash. C. C. R., 328; 3 Blackf., 354.

Whether it was accepted in satisfaction is a question for the jury. 2 Par. on Con., n. d., 98, and citations.

It must be advantageous to the creditor. 1 Metc., 378; 2 Par. on Con., 199; 4 Dana, 530.

Both parties must perform their parts.

Where it was agreed that plaintiff and defendant should each deliver up his part of an indenture to be cancelled, and the defendant had delivered up his part, it was held no accord and satisfaction. 3 Black., 15, n. 42; 3 Levinz, 2.

Every part of the new matter agreed to be received as satisfaction must be effectual, so that if a part fail or do not take effect, the whole agreement is bad. The legal notion of accord is a new consideration to discharge the debtor. 1 Smith's L. C., 445.

Charge of the Judge.—We submit that there is no error in the charge of the Judge, and that if there be any, that the verdict is consistent with right and justice, based upon the law and the evidence, and this court will not disturb it, recognizing the familiar principle that in such cases courts never do grant new trials, whatever the misdirection or error of the Judge.

Upon the above principles we submit:

1. That the respondent never received the notes and drafts mentioned in the second plea in satisfaction and dis-

charge of the notes sued on; that in fact the notes never came to the possession of the respondent, but were placed in the hands of a depositary, Pasco, under an executory agreement between the appellant Sloan and the respondent, to be held by him till respondent should deliver deed and original notes; that this agreement was not obligatory or binding upon respondent, being founded upon no valuable consideration.

2. That the drafts were to be a part payment on the original note then due, when paid, and were received as such and credited upon this note as such.

3. That the original transaction was to stand until the new one was fully executed, and the new agreement never was executed, and was *nudum pactum.*

4. Admitting that the delivery of the drafts was one step in the new agreement, there was still no cancellation of the old agreement. It amounted, then, in fact, assuming that prompt payment was made of the drafts, to but part payment of a very large unpaid balance, and an executory agreement resting upon no valuable consideration as to the balance of the notes which was never carried out.

5. That before the agreement was executed, Sloan confessed his inability to perform his part, and that this relieved respondent from all *moral* obligation to perform what he never was under any *legal* obligation to do.

6. That there was no agreement to take Sloan as purchaser of the land, and no contract of purchase made between them on the 1st November, 1872, but that the whole transaction was an application by Sloan for indulgence and an agreement upon the part of Gamble to grant it. That in it Sloan was the only party seeking to be benefitted, and the benefit offered by Gamble was a mere gratuity, he, Sloan, being as much liable upon the old notes as he could make himself by any new obligations and they being for the land in question.

7. The payment made on the drafts of $1,000 each, being

less than the amount due on the 1st day of November, 1872, on the note falling due Jan'y 1st., 1872, was not a consideration for the agreement to take new notes.

RANDALL, C. J., delivered the opinion of the court.

This suit was commenced by an attachment against Sloan as a non-resident, and by service of a summons upon the defendant May. The amount claimed in the affidavit upon which the attachment was issued, was $5,248.20. The penalty of the bond executed upon the issuing of the attachment was $10,500 and was signed by two sureties, who each made oath that he was worth the sum of $5,250 over and above his liabilities and the exemptions allowed by law.

The defendant, Sloan, made a motion to dismiss the proceedings and the attachment on the grounds that the bond is insufficient because it does not appear that the sureties are each worth double the amount of the sum demanded, and therefore the two sureties are only equal to one such as is required by law; and further, that the sum claimed is not actually due as stated in the affidavit.

The motion to dismiss was denied by the court.

As to the first ground of the motion, the insufficiency of the sureties on the bond, it appears that each of the sureties made oath that he was worth the amount of the debt demanded. The judge decided that the bond was good and sufficient, to which the defendant excepted and this ruling is assigned as error.

The law requiring and prescribing the requisites of the bond in such cases is found on page 368 of Thomp. Digest. It requires that the plaintiff "shall enter into bond with two good and sufficient securities, payable to the defendant, in at least double the debt or sum demanded." The bond filed in this case was executed in due form and in double the amount of the sum demanded by the plaintiff and two secuties. Each of them made affidavit that he was worth the

amount due as stated, though the statute does not require such affidavit to be made or any affidavit.

In this form the bond was approved by the proper officer as sufficient, and in our judgment it was a compliance with all that the law requires. There was no evidence offered to show that the securities were not perfectly good for the requisite amount. The judgment of the officer as to the sufficiency of the securities seems to be the only test provided by the statute to authorize the issuing of the writ, and if the sufficiency of the bond, good upon its face, is attacked, it should at least be shown that the officer acted corruptly, or that he was imposed upon or improperly induced to accept irresponsible or insufficient securities, and this would present an entirely different question. As to the other ground of the defendant's motion, that the amount claimed is not due as stated in the plaintiff's affidavit, it will be disposed of in considering the evidence.

This suit was brought by plaintiff upon two promissory notes given to him by May and Sloan jointly, and dated July 22, 1869, for thirty-five hundred dollars each, payable respectively on the first of January, 1872, and the first January, 1873, with interest at eight per cent., payable annually, with payments endorsed thereon amounting to $3,652.89.

The defendants pleaded as follows:

1st. That the notes were paid before suit.

2d. That before action plaintiff received from defendant Sloan, upon a valid agreement between them made Nov. 15, 1872, in lieu and place of the two notes, and in full satisfaction and discharge thereof, two drafts of $1,000 each, drawn by Sloan & Co. of Savannah, one at 15 days upon Coulter & Co. of Baltimore, and duly accepted by them, and one due 15th of February, 1873, upon A. M. Sloan & Co., and accepted by them; also three promissory notes, one for $1,957.20, due May 1, 1873, and two for $3,500 each, due February 1, 1874, and February 1, 1875, all drawing

interest at 8 per cent., payable to plaintiff's order and secured by a mortgage on lands that day bargained and sold by plaintiff to Sloan.

3d. For an "equitable defence" defendants allege that defendant Sloan signed the notes sued on as surety for May, of which plaintiff had knowledge at their date, and that before suit plaintiff entered into a new agreement in regard to the lands in part payment for which the notes were given, by the terms of which new agreement, May, for a valuable consideration, sold to Sloan his interest in the lands, and the further consideration that Sloan would assume and pay the balance due to plaintiff; and plaintiff received and accepted Sloan as the purchaser instead of May, and assented to Sloan's taking possession, and released and discharged May from all liability in regard to the purchase, and accepted in payment and satisfaction of the notes sued on, and of other notes given for the purchase of the lands, the notes and drafts mentioned in the second plea and secured by mortgage. That under the new agreement Sloan was to deliver the drafts to plaintiff and place the notes and mortgage in the hands of a depositary to be delivered to plaintiff on his placing with the depositary a deed of the lands to Sloan, and the cancelled notes. That Sloan has complied with his part of the new agreement to be performed before the delivery of the deed, but plaintiff has failed to deliver the deed and the notes. That Sloan has paid a portion of the purchase money under the new agreement to plaintiff and to defendant May, and has gone into possession of the lands, and he insists that plaintiff ought not to further prosecute the suit upon the cancelled notes.

The plaintiff replying to the second plea denies that he received the drafts and notes mentioned in satisfaction and discharge of the notes sued on.

To the third plea plantiff replies denying the allegations therein as to himself, and says that the pretended new agreement was never executed, was without consideration and

nudum pactum. That the new notes mentioned are not, and never have been in his possession, and are still in possession of Sloan or his agent or attorney.

The cause was tried before the Circuit Court and a jury, at the fall term, 1873, in Jefferson county, and the plaintiff had a verdict for the amount due upon the notes sued upon, assessed at $5,249.43.

The defendants moved for a new trial upon the grounds (generally stated) that the verdict was contrary to law and to evidence, and that the judge misdirected the jury in his charge.

This motion was overruled and judgment rendered against the defendants, from which judgment they appealed to this court.

As appears from the testimony upon the trial of the cause, the notes upon which this suit was brought were the second and third to become due of four notes of equal amounts, given as the joint notes of the defendants May and Sloan to plaintiff, upon the purchase by May from plaintiff of a plantation, and certain stock and implements, for the price of $20,000. A payment of six thousand dollars was made by draft upon Sloan & Co., which draft was paid by them. The contract for the purchase was in writing, dated July 22, 1869, signed and sealed by May and Gamble. As part of the contract, Gamble executed to May a bond conditioned that he would execute to him a deed upon the payment of the draft for $6,000. By an instrument indorsed thereon, signed and sealed by May, he assigned to A. M. Sloan & Co. the bond and gave them "full control" of the same on the 27th February, 1871. An admission of parties in writing shows that Sloan became a part owner of the plantation in 1870.

Mr. Sloan, in behalf of defendants, testifies that in November, 1872, he met Mr. Gamble by appointment at Tallahassee, and made known to him that he desired to make a change in the purchase, and made to him this proposition,

which he accepted: There was then due on one of the notes about $2,800, or $3,000. I proposed to give him a 15 day draft on Coulter & Co., of Baltimore, for $1,000; a draft payable February 15, 1873, on A. M. Sloan & Co., for $1,000; two notes for $3,500 each, payable February 1, 1874, and February 1, 1875, with interest from January 1, 1873, and the balance in a note for $1,957.20, due May 1, 1873. It was agreed that Mr. Pasco should act for both parties in making this settlement, drawing the papers and carrying it out. The drafts were drawn and signed by witness and delivered to Mr. Gamble as payment on this contract. The new notes were then drawn and signed and placed in the hands of Mr. Pasco. Witness was to execute a mortgage on the property to secure the payment of the notes, which mortgage he executed next day and left with Mr. Pasco as agreed, to be delivered to Col. Gamble as soon as he could perfect his deed, his wife being absent but looked for by the 20th of December. The understanding was that the original notes now sued were retired and were to be delivered to Mr. Pasco when Gamble executed the deed. The arrangements between witness and May were fully explained to Col. Gamble at Tallahassee. He assented to witness becoming the purchaser from him of the lands at the time the drafts and notes were executed on the 15th November, 1872. They were given for the purchase of the plantation, and witness went into possession of the land under this purchase at the close of the year. This was with Col. Gamble's consent.

On cross-examination, witness said Mr. Pasco was to deliver the new notes and mortgage to Col. Gamble, when the Col. should deliver to him the deed and the old notes. The old notes were to belong to Mr. May after they were delivered to Mr. Pasco.

S. Pasco, a witness for defendant, testified: The transactions between May and Sloan were explained to Col. Gamble and it was arranged that Sloan was to become the pur-

chaser, the deed to be executed to him; the balance of the purchase money due on the original purchase to be estimated to January 1, 1873, and Sloan's individual notes to be substituted in the place of the old notes. The drafts were turned over to Col. Gamble at the time, November 15, 1872, as a part payment on the new purchase. Witness still holds the notes and the mortgage under the agreement, not as Col. Sloan's, but to be delivered to Col. Gamble whenever he complies with his agreement. He has never tendered me the deed or the old notes as it was agreed that he should. The deed was to be delivered before any of those notes were paid, and for that reason all the notes were embraced in the mortgage. Col. Sloan has more than once applied to me for the deed, and I have more than once reminded Col. Gamble of his neglect or failure to deliver the deed under the terms of the agreement. Witness' duty, as he understood it, under this agreement was to deliver the three new notes and mortgage to Col. Gamble, to deliver the old notes to Mr. May and the deed to Col. Sloan.

Cross-Ex.— Do not know that Col. Gamble ever refused to carry out that agreement. He never tendered the deed to me. It has never been delivered to me. I never made any demand for it, never considered that I had any right to do so.

R. H. Gamble, plaintiff, sworn, testified: The notes sued on were given by May and Sloan for lands sold to May; only one of them was past due on the 15th November, 1872. On that day, Col. Sloan with Mr. Pasco came to my office in Tallahassee, and stated that he wished to get time on the payments which were due and past due. He said that May had failed, and asked me to enter into a new arrangement with him. I suggested to Mr. Sloan that May held my bond for title. They informed me that the bond had been transferred to Mr. Sloan. Sloan then urged me to make a new arrangement; he wanted additional time to meet the balance of the payments. Proposed to pay me $1,000 in a 15 day

draft on Coulter & Co., another draft on his house in Savannah for same amount, and balance in three payments, one to fall due 1st May, 1873, for $1,957.20; one for $3,500, due February 1, 1874, and another for like amount to fall due February 1, 1875. I suggested to him that if I agreed to that he ought to pay me ten per cent. interest on the last two notes. He urged me to not to make that demand and I yielded. It was then agreed between us that we should go into the new arrangement as proposed. Told him I could not give him title on account of my wife's absence. He said it would make no difference, that Mr. Pasco, his agent, would draw up the papers and the matter could be consummated afterwards. Calculations of the interest on the various notes made by Mr. Pasco and Col. Beard. The two drafts were then drawn by Mr. Sloan; I felt a little hesitancy in taking those drafts and took Mr. Pasco one side and asked him whether it would not be better for me to have them inserted in the mortgage. Mr. Pasco suggested that it was unnecessary to put them in the mortgage because they would become due in all probability before the deeds would be exchanged, and if they were not paid, I would have the original notes to fall back on. The drafts were then given to me, and I requested Col. Beard to credit them on the note which was past due, which he did on that day while the other gentlemen were in the room. The drafts were paid.

Mr. Pasco sent me the deed to be executed and it was executed by myself and wife, but not delivered. After executing the deed I wrote to Col. Sloan asking whether I could rely with certainty upon payment of the note falling due May 1st, 1873. He answered on the 30th April, that he could not pay it. I notified him in one of the letters that if he did not pay that note due May 1, I would fall back on the original notes. I notified Mr. Pasco that I was ready to carry out the arrangement, but that Mr. Sloan would not pay the note due May 1st. Witness related some further conversation with Mr. Pasco, including a proposition to extend the time to

December 13th on that note, provided Sloan would consent to advance the other notes from February 1st to January 1st, which proposition was declined by Mr. Sloan. In July or August, I sent the deed and the old notes to Mr. Papy at Savannah, requesting him to tender the deed and complete the arrangement, provided he would pay the $1,957.20 note past due, and receive the mortgage and the new notes. Mr. Papy returned the papers I had sent him, saying Mr. Sloan had declined paying the money on that note. I did not receive the drafts and notes and mortgage in satisfaction and discharge of the original notes. Mr. Sloan did not come to me with a proposition to buy lands but to inform me of Mr. May's condition, and that he would have to become the owner of the land and work it out himself. His object, as I understood it, was to get an extension of time. There was nothing said about the value of the land, but it was all about the remaining indebtedness for it. There was not a word said about the old notes being cancelled; on the contrary, he was reminded by Mr. Pasco that he could fall back on them. Mr. Pasco was not my agent. There was then past due on one of the original notes a larger amount than the two drafts. Col. Sloan offered no consideration or benefit for acceding to his request, only the promise of prompt payment. I was not in possession of the land and did not put him in possession.

Cross-Ex.—The understanding in Tallahassee was, that the deed was to be executed and delivered to Mr. Pasco after the return of Mrs. Gamble; she returned late in January. I have never tendered the deed to Mr. Pasco, but had it ready and so informed him, and that Mr. Sloan had said that he could not pay the note due in May, and for that reason I did not deliver the deed to Mr. Pasco.

Wm. K. Beard testified in behalf of plaintiff: Was in Col. Gamble's office in Tallahassee 15th November, 182. Col. Sloan and Mr. Pasco came in, and Sloan stated that he came to see Col. Gamble for the purpose of obtaining an ex-

tension of the time on payment of the balance on the plantation. That he had purchased May's interest. He made a proposition to make certain payments if the new arrangement was accepted. I indorsed the credits on the old note of the two drafts on that day. Col. Sloan expressed himself as under obligations to Col. G. for giving him this extension. I heard nothing said about a sale or purchase of lands, but the arrangement was entirely upon an extension of time. I did not understand that Col. Gamble received the new notes in satisfaction of the old ones, but I understood he held the old notes as his property until the new arrangement should be consummated.

M. D. Papy, witness for plaintiff, testified: In August, 1873, was in Savannah and received a letter from Mr. Gamble with a deed of the land to Sloan, executed by Gamble and his wife, and the notes signed by May and Sloan, with a request in the letter to tender the deed to Sloan, in performance of the understanding or agreement made in November, 1872, and to deliver the deed and original notes if Mr. Sloan would pay the amount of the note due May 1st, 1873, and deliver the other notes and mortgage to secure them. I called on Mr. Sloan and explained the object of the visit, exhibited the deed and the old notes, and made the proposition authorized by Col. Gamble. Mr. Sloan said he could not pay the money at that time.

Cross-Ex.—I do not recollect that Col. Sloan demanded the note payable in May from me; I understood those notes were in the hands of Mr. Pasco as Mr. Sloan's agent, and that of course it was in his own control. I returned the papers to Col. Gamble and wrote him the result of the interview.

Col. Sloan recalled.—The credits of the two drafts were not made in my presence; it was not asked for; never was expected; they were paid upon the new contract. The new notes were filled up and I signed them at Tallahassee, and

they were delivered to Mr. Pasco as the property of Col. Gamble. That is my understanding.

S. Pasco recalled.—I did not see the credit entered on the note; if it was done in my presence my attention was not called to it. In regard to the side talk with Col. Gamble, I did suggest the two ways mentioned in his evidence, in which he could retain his security, but neither of them was incorporated in the bargain. The new notes are still in my hands in accordance with the original agreement, as Col. Gamble's property, whenever he gives me the deed and the old notes as he agreed. I have no authority even to deliver them to Col. Sloan. Col. Gamble has never notified me prior to the commencement of this suit that he would refuse to carry out the new agreement. He has sought my aid in relation to the $1,957.20 note, and I have written Col. Sloan in regard to it.

Cross-Ex.—The aid I referred to was to make the proposition for the extension of the note due May 1st, and other matters. Prior to this, Col. Gamble complained to me that Col. Sloan had not paid this note. I reminded Col. G. that he was the first defaulter in failing to deliver me the deed as he had agreed.

This is the substance of all the testimony incorporated in the record as given before the jury. Upon the trial of the traverse before the judge, *Alvin May,* one of the defendants, testified that he had sold his interest in the lands to Sloan and assigned the bond to Sloan & Co. "That Sloan was to give him so much, a certain amount for his interest in the lands and half the profits accrued at that time, and to take up his paper in the hands of plaintiff, and the agreement was carried out January 1, 1873, and he received the amount due him in the arrangement."

Mr. Sloan, upon the traverse before the judge, testified that the indorsement on the bond for title was signed by May, and was as a collateral security to A. M. Sloan & Co. That he bought May's interest in his individual capacity,

with the understanding that he should become responsible to plaintiff, and asked plaintiff to extend the time of payment for a year, which he did. That *after the purchase from May,* he went to plaintiff and made the arrangement set forth in the papers submitted, and that two months after the making the arrangement with plaintiff he paid May $7,800, believing that plaintiff would carry out his part of the agreement. The whole matter of the business with May was explained to plaintiff at the time of the new agreement.

On cross-examination, Sloan testified that the payment to May was a *credit on his liability to him,* and he was seeking to collect that debt, and May still owes him a large balance, which is a part of the same indebtedness on which the credit was made.

Col. Gamble also testified upon the traverse, that his action in the transaction on the 15th November, 1872, "had not the remotest connection with any transaction between May and Sloan, and that he had no idea till to-day that Sloan paid May any consideration for the land." That all the propositions came from Mr. Sloan. That Mr. Pasco did not act in his behalf at all except in the matter of the last proposition (as to time and interest) which Sloan rejected.

The 4th, 5th and 6th errors assigned are as follows:

4. In the trial of the issues raised by the pleadings, the rulings of the court were erroneous and debarred the jury from bringing in a verdict for the defendant upon any of the issues, and the new trial applied for should have been awarded.

5. The court misled the jury in its charge upon the law applicable to the first, second and third pleas of the defendants.

6. The merits of the case are with the appellants and they are entitled to a verdict and judgment upon the whole case as presented by the record.

As to the said errors numbered 4 and 5, it may properly be remarked that they are very general in their character,

but not more so than the exceptions to the charge of the judge to the jury. The only exception is to the whole charge in these words, "To which said opinion and charge of the court upon every of the defendant's pleas, the said defendants by their attorney did then and there except."

In Lincoln vs. Claflin, 7th Wallace, 132, 139, the opinion of the court has this language: "It is possible that the court erred in its charge upon the subject of damages in directing the jury to add interest to the value of the goods. Interest is not allowable as a matter of law except in cases of contract, or the unlawful detention of money. In cases of tort its allowance as damages rests in the discretion of the jury. But the error, if it be one, cannot be taken advantage of by the defendants, for they took no exception to the charge on that ground. The charge is inserted at length in the bill. * * * It embraces several distinct propositions, and a general exception in such a case cannot avail the party if any one of them is correct."

Now, while the judgment thus announced by the Supreme Court of the United States is based upon a rule adopted regulating the practice in that court and is in accordance with the very general practice of the State courts, and with the rules of this court, we have not been inclined to hold parties to the very letter, and have subjected ourselves frequently to much labor and inconvenience by relaxing it, and we are not now inclined to be rigid.

The Supreme Court of the U. S. in the case cited found, by exploring at random the charge of the court, an error which, would have been fatal had an exception been taken to the particular language of that portion of it, yet because the appellant had merely entered a general exception to the whole charge, the court finding it generally correct, refused the benefit of the error to the party injured by it. See also Pratt vs. Foot, 5 Seldel, 463; Shepherd vs. Benton, 20 Iowa, 41; Spray vs. Scott, Ib., 473.

In the case at bar we find the charge given at length,

covering some six written pages, with the single exception to the whole charge as above noted.

As the charge of the court upon the matter of the first plea contains but one or two brief propositions, the general exception as to that is not subject to a strict enforcement of the rule.

The 5th ground of error, that the court "misled the jury in its charge upon the law applicable to the first, second and third pleas," we will briefly consider, but in order to ascertain in what the error consisted we are obliged to resort to the brief and argument of counsel in order to find the point of the objection; and the part of the charge as to the first plea so objected to is as follows: "It is incumbent on the defendant to prove that he has paid the notes sued on; this may be either in money, or if by other notes, he must show that they have been paid." The opinion of Ch. Justice Marshall is quoted in opposition to this, (6 Cranch, 253,) as follows: "The note of one of the parties, or of a third person, may *by agreement* be received in payment. The doctrine of *nudum pactum* does not apply to such a case, for a man may, if such be his will, discharge his debtor without any consideration."

The charge of the circuit judge was, however, in our judgment applicable to the case as it appeared in evidence. The defendant Sloan says he gave the drafts and the new notes as a "payment" of the original notes held by Gamble; but he does not swear that Gamble *received* or *agreed* to receive them in payment of the old notes, or that Sloan proposed it to him. Sloan's testimony is to a conclusion of law and fact, and not to the facts from which such a conclusion can be drawn. Sloan's testimony further shows that the new notes were not delivered to or received by Gamble at all, but were to be delivered upon the happening of another event, which has not transpired. Gamble swears that he did not receive the notes in payment or in satisfaction of the old notes.

The Supreme Court of New Hampshire in Elliot vs.

ceper, say we have settled, after much deliberation, that the ceipt of a note is not a payment of a prior debt, unless by xpress argument.

In 7 Foster, 253, the same court say, a promissory note is not a payment of a pre-existing debt, unless there be an agreement to that effect when the note is given.

In 15 New Hampshire, 332, it was held that to make a note a payment of a pre-existing debt, there must be either an express agreement to receive it in payment, or there must be circumstances from which an agreement might be inferred.

Lord Kenyon says in Puckford vs. Maxwell, 6 T. R. 52, where a bill is given for a debt, and in payment of it, if the bill which is given in payment do not turn out to be productive, it is not that which it purports to be, and which the party receiving it expects it to be, and therefore he may consider it a nullity and act if no bill had been given at all.

In Bank vs. Bobo, 9 Richardson, 31, the court say, to constitute anything else than money a payment, it must be accepted as such, or payment in fact *must result from it*. The case of Peters vs. Burnhill, 1 Hill (S. C.,) 236, *a*, was a case where a note was set up as payment, and the court held if it was accepted as such, it might be so regarded. In Costello vs. Cave, 2 Hill, 531, the judge says that if a bill or note be given on account of a previous debt, this is no payment unless it be *expressly accepted* as payment, *or produce payment*, and see Mooring et al. vs. M. Mutual Ins. Co., 27 Ala., 254, fully sustaining the almost universal doctrine.

In the entire absence of any proof going to show that Gamble received the notes as a payment, or agreed that the entire transaction should then operate as a payment, there was nothing before the jury to establish a payment of the original notes. Had the new notes been delivered to Gamble and retained by him, it would then, under the circumstances of this case, have been a question to be submitted to the jury whether such an agreement was made. The manner giving of the new notes, and their acceptance, in consider

tion of a precedent debt is not a payment and does not extinguish the debt, unless such agreement can be deduced from the circumstances, or unless, in the language of cases cited above, the new notes "produce payment," or payment in fact "results from it." And the language of the circuit judge in the charge upon the point is very nearly synonymous with that quoted from 9th Richardson and 2d Hill, and fully sustained in Puckford vs. Maxwell. Maine, Vermont and Massachusetts are the only States in which a different rule has prevailed, and in those States it has recently been modified to the extent that the giving and receiving of a new note for a prior indebtedness is presumptive evidence of payment. In the case at bar there was no evidence from which the jury could well infer that a payment was made beyond the amount of the two drafts which were indorsed upon the past due note of May and Sloan, and subsequently paid.

As to the second plea, accord and satisfaction, the defendants plead "that the plaintiff received from defendant Sloan, upon a valid bargain and agreement entered into between them, in lieu of the notes sued upon, and in full satisfaction and discharge of the same," the drafts and notes mentioned.

"Accord and satisfaction, (says Parsons on Contracts,) is substantially another agreement between the same parties in satisfaction of the former one, and also an execution of the latter agreement. This is the meaning of the ancient rule, that accord without satisfaction is no bar to an action; and it used to be laid down in the earlier books with great exactness that the execution of the accord must be complete and perfect. So, indeed, it must be now, except where the new promise itself is, by the accord or agreement, the satisfaction for the debt or broken contract. * * * * Generally, but not universally, if the new promise be founded upon a new consideration and is clearly binding on the original promisor, this is a satisfaction of the former claim, and otherwise it is no satisfaction. * * If the new

promise is executory, and is not binding, it is no satisfaction until it be executed, and although it is to be performed on a future day certain, the promisee may have his original action before the new promise becomes due." 2 Parsons on Con., 681, 5th edition.

A plea that the plaintiff accepted an order of the defendant on a third person for a given sum in satisfaction of the promises, is no bar to an action for the original cause of indebtedness; nor is a plea good as an accord and satisfaction that the plaintiff agreed to accept the note of a third person, which, on being tendered, he refused to accept. Hawley vs. Foote, 19 Wend., 516.

The charge of the court upon the matter of the second plea is found to be somewhat general, and contains propositions which are good in law. If the defendant desired a more specific charge, he had an opportunity and the right to request it, and to suggest such instructions as he desired should be specifically given, according to his view of the case. We do not think the jury were misled by the instructions given, and unless it appears to be probable that they were led to a misapprehension of the case or the law, by the absence of more full and minute instructions, there would be no propriety in disturbing their finding. The charge was not violative but was in accordance with the law already quoted from standard authority. The jury were correctly instructed as to their duty in reference to the finding of the facts necessary to sustain the plea, and we cannot disagree to their conclusions. The new agreement proved was an agreement assented to on the part of the plaintiff at the request of the defendant Sloan, and for his benefit exclusively, without any consideration to plaintiff beyond the promise of more promptness in making payment of the money due and to become due. The agreement was entirely executory, except as to the two drafts of $1,000 each. There was no new agreement to purchase the land, no new or other consideration as to its price, but a mere consent by plaintiff to

to Sloan as assignee of May, the assignment having
ɛcuted long before, and to which the plaintiff was
arty. The amount of the two drafts was indorsed as
h received upon the old notes, on the same day—a
ɜtance confirmatory of plaintiff's testimony as to the
er of the whole transaction, for if he had regarded
eement as a *satisfaction* of the former notes, he would
aturally have treated them as satisfied and not as
ng demands. The effort to treat the accord as exe-
y the delivery to Mr. Pasco of the new notes and the
ge, can scarcely be treated seriously in the face of the
of the depositary to the plaintiff, to the effect that in
the non-payment of the drafts, he could fall back
ıe original notes, whether the adviser be deemed the
y of the plaintiff or of the defendant, or of both, on
ɜasion, and the absence of any vestige of consideration
ɛfit to the plaintiff, the amount of the drafts being
ess than was already due, left no shadow of legal ob-
ı on the part of the plaintiff to perform. The drafts
iven and received to be applied upon the original in-
ıess and were so applied.

ɔ the third plea as a defence upon equitable grounds,
y facts alleged and necessary to be considered in ad-
to those already referred to, are, that Sloan was the
ɔf May upon the original notes, and that by the terms
new agreement with the plaintiff, May sold to Sloan
ɜrest in the lands, and upon the further consideration
oan would assume and pay the balance due for the
o plaintiff, the plaintiff thereupon received and ac-
Sloan as the purchaser, and assented to his taking
ion of the same, and released the defendant May from
ther liability, &c.

ıis plea the only fact additional to those set up in the
ıs plea, and as an equitable consideration, is that of
·chase by Sloan from May in pursuance and in conse-
of his changed relations toward the plaintiff. The

proofs on the subject were that "*after* the purchase from May he went to plaintiff and made the arrangement set forth in the papers submitted," and two months after this arrangement he paid May for his interest in the land "by *crediting* him with the amount" on a *previous liability* to Sloan, May still owing him a large sum; and this is the testimony of Sloan himself.

The equitable premises being thus swept away by the defendant's own testimony, it is unnecessary to consider the subject further. The charge upon this third ground of defence covers, in point of fact, the whole case, and we cannot ascertain upon an examination of it what portion of it is erroneous as applied to the pleadings and the facts proved. Nor does it disclose the fact that the court sought to prejudge the case; and upon the whole case we are of the opinion that no error was committed by the court in the charge which tended to prejudice the rights of the defendants under the law and the facts. Although the exceptions may show that there has been a mistake in the directions of the court to the jury, yet if it be upon a point on which justice has been done, or in which a mistake could not have altered the verdict, a new trial will not be granted. Ross vs. Bank of Burlington, 1 Aiken (Vt.) 43; Randall vs. Parramore, 1 Fla., 409; McKay vs. same, 5 Fla., 268; Doggett vs. Willey, 6 Fla., 482; Proctor vs. Hart, 5 Fla., 465.

We have given the principal and material parts of the testimony upon the trial, and as it appeared before the court upon the traverse of the affidavit upon which the attachment was issued, for the purpose of determining thereon whether the judge erred in deciding that the affidavit was true as to the allegation of indebtedness, and our judgment is that he committed no error in his finding upon the law and the facts in favor of the plaintiff.

The other points made by the assignment of errors are covered and disposed of in determining the question stated.

The judgment of the Circuit Court is affirmed with costs.

RICHARD DUKES, APPELLANT, VS. THE STATE OF FLORIDA, APPELLEE.

1. Where there is a deficiency of grand jurors, the Court, upon issuing a *venire*, may restrict the sheriff in his selection to persons drawn from the list furnished by the county commissioners under sections 2 and 3 of Chap. 1628, Laws of Florida, and the required number of persons may be drawn from such list by the county judge, the clerk of the Circuit Court and the sheriff. The statute does not prohibit such course, nor does it direct a different method, and this course is in entire harmony with the spirit and the general intention of the Legislature.

2. Where it is alleged that the Judge erred in refusing to give to the jury certain instructions prayed by defendant's counsel, and that the Judge charged the jury orally and not in writing upon certain points, the record of the case should show affirmatively that the alleged facts so alleged to be erroneous transpired. The recital in a motion for a new trial of such grounds of the motion is not enough, and the Court will not consider the matter so presented.

3. The Court charged the jury that "the killing being proved, though nothing else be shown, the offence is murder, the burthen of examination being thrown on the accused:" *Held*, that this is erroneous. Under the laws of this State, (1868,) it is for the jury to determine from all the circumstances of the case, whether the offense is murder in the first, second or third degrees, or manslaughter, or justifiable or excusable homicide. The presumption that the offence is murder, manslaughter, or justifiable or excusable homicide, is a presumption of fact to be found by the jury, and not a presumption of law to be drawn by the Court. Such a charge is not "exclusively on points of law," as is required by our statutes. The opinion of the Court in Gladden vs. The State, and Dixon vs. The State, 13 Fla. Rep., commented upon.

4. Where, under an indictment for murder, the Court charged the jury that "if you find the prisoner guilty, it is for you to say from the evidence whether he is guilty of murder in the first, second or third degree; if you find from the evidence he is not guilty in either degree, you will return a verdict of not guilty," this is held to be error, as it precluded the jury from finding a verdict for manslaughter, and as they did not find him guiltless, they were forced to find him guilty of murder.

Appeal from the Circuit Court of the First Judicial Circuit for Jackson county.

Richard Dukes was indicted and convicted of murder in the first degree at the fall term, 1873, of the Circuit Court of Jackson county.

The following charge was given to the jury:

By the statues of Florida there are three degree of murder. The first is defined by the statute to be when the killing is perpetrated from a premeditated design to effect the death of the person killed, or any human being. The 2d is when perpetrated by any act immediately dangerous to others and evincing a depraved mind, regardless of human life, although without any premeditated design to effect the death of any particular individual. The 3d is when perpetrated without any design to effect death, by a person engaged in the commission of any felony.

Murder is defined to be when a person of sound mind and discretion unlawfully kills a reasonable creature, with malice aforethought, either express or implied. Express malice is when one with a deliberate mind and formed design does kill another, which design is evidenced by lying in wait, antecedent threats, former grudges, and concerted scheme to do him some bodily harm. The law implies malice when one man kills another suddenly without any or without considerable provocation.

All homicide is presumed to be malicious, and consequently to amount to murder, unless when it appears upon evidence to be either justified, excused, or on account of accident, or self-preservation.

When the act is committed deliberately, with a deadl weapon, and is likely to be attended with dangerous cons quences, the malice requisite to murder will be presume the law infers that the natural or probable effect of any a deliberately done, is intended by its actor.

The killing proved, even though nothing else be sho

the offence is murder, the burden of extenuation being then thrown on the accused.

You must be satisfied from the evidence that every material allegation in the indictment has been proved as alleged.

To make a man principal in a murder, it is not necessary that he should inflict the mortal wound. It is sufficient if he be present, aiding and abetting the act; nor is it necessary there should be a particular malice against the deceased; it is sufficient if there be deliberate malignity and depravity in the conduct of the accused.

The dying declarations of a person who expects to die, respecting the circumstances under which he received a mortal injury, are admitted as evidence; they are admitted from the necessity of the case to identify the prisoner, and to establish the circumstances of the direct transaction from which the death results. Dying declarations must be made under a sense of impending dissolution and a consciousness of the awful occasion.

It is not necessary to prove expressions implying apprehension of immediate danger, if it be clear that the party does not expect to survive the injury, which may be collected from the general circumstances in evidence before you of his condition.

When dying declarations, made under the belief of impending death, are inconsistent with each other, it is the duty of the jury to weigh them and to determine which of them is to be believed. The death being established by the proof before you, it is your duty to enquire if the deceased came to his death by the unlawful act of the prisoner at the bar.

If from the evidence a reasonable doubt arises in your minds whether, on the one hand, the death of McDaniel resulted from accidental causes, or, on the other, from the deliberate and wicked act of the prisoner, you should give the prisoner the benefit of such a doubt.

If you believe from the whole evidence, beyond a reasona-

doubt, the prisoner wilfully, and without any justifiable
ıse, inflicted the wound on McDaniel, or aided and
etted in the infliction, and the wound was ultimately the
ıuse of the death of McDaniel, you may find ac-
used guilty. It makes no difference whether the wound
was in its own nature instantly mortal, or whether it be-
came the cause of death by reason of the deceased not hav-
ing adopted the best mode of treatment; the real question
for you to determine is whether in the end the wound in-
flicted by accused was the cause of the death. But it is for
you to determine whether the death of the deceased was oc-
casioned or accelerated by medicines administered, or the
dysintery with which he was afflicted.

But if you believe from the evidence the wound inflicted
was not dangerous in itself, and death was evidently occa-
sioned by grossly erroneous and bad treatment, the original
author will not be accountable. But it is for you to
evidence of the two physicians who have been examined and
testified before you that the wound was mortal or danger-
ous, the person who inflicted it cannot shelter himself under
the plea of erroneous or bad treatment.

When acts are of an official character, the concurrence of
official persons, a presumption arises in favor of their due
execution, for everything is presumed to be duly and right-
ly performed until the contrary is shown. So, also, when
a person who is generally known and admitted as a public
officer, may generally officiate without producing his com-
mission or appointment, and his acts are *prima facie* legal.

It is for you to determine from the evidence whether
George Robinson who issued the warrant exhibited on thi
trial was authorized to officiate and execute the warrant.

If any one under color or claim of authority *unlawfully*
arrest or actually attempt, or offer to arrest another, he doe
so at his peril, and if the person whom he offers to arrest re
sists, and in his resistance kills the aggressor, it is not mu

der in the first degree but may be of a lesser degree, according to the circumstances.

If from the evidence you are satisfied that McDaniel having in his possession a warrant from Justice of the Peace George Robinson of Jackson county, for the arrest of Harrod Gillam, Richard Dukes, Willis Dukes, Sanders Tazwell and George Wilson, believed he was lawfully authorized to arrest those parties, who were charged with a felony, and he so believing attempted to arrest them, then he was not so unlawfully acting as would constitute his acts such an offence against the person as would authorize these parties to resort to violent and extreme resistance, and if under such circumstances the prisoner, and those charged with him, did resort to violence which resulted in the death of McDaniel, it is homicide, and it is for you to say from all the evidence before you in what degree.

If a person upon meeting his adversary unexpectedly, who had intercepted him upon his lawful road, and in his lawful pursuit, accepted a fight when he might have avoided it by passing on, the provocation being sudden and unexpected, the law will not presume the killing to have been upon an ancient grudge, but upon the insult given by stopping him on the way, and it will not be murder in the first degree.

If the deceased was approaching the prisoner's path with the intention of assailing the prisoner, and became irresolute and stopped, or abandoned his intention, leaving the prisoner full liberty to pass, and the prisoner, with a design of slaying the deceased, brought on the attack, the killing is murder in the first or second degree, according to the circumstances proved before you by the witness.

If you believe the prisoner at the bar conspired with others, with deliberate, malignant, and depravity of conduct, to effect the death of any human being, and you are satisfied from all the evidence and circumstances detailed upon this trial, together with the sworn statement of the prisoner, he did conspire with others with a premeditated design to effect the

death of McDaniel, and they did shoot and wound McDaniel, and he died of the wound so received, and you are satisfied the prisoner was present, whether he shot the gun himself or not, he is equally guilty with the others, for all who were aiding and abetting the act are guilty of murder in the first degree.

But if from all the evidence and circumstances detailed before you, and the statement of the prisoner, which is evidence before you, you are satisfied beyond a reasonable doubt that the shooting of McDaniel was perpetrated by the prisoner, or he was present aiding and abetting the act, or that such act was imminently dangerous to others and evincing a depraved mind regardless of human life, although without any premediated design to effect the death of any particular individual, and you are also satisfied that McDaniel died in consequence of the wound thus inflicted upon him, you may find the prisoner guilty of murder in the second degree.

But should you conclude from the whole evidence before you, beyond a reasonable doubt, that the shooting was done without any design to effect death, but was done while the conspirators were engaged in the commission of any felony, you may find the prisoner guilty of murder in the third degree.

If from all the evidence and circumstances connected therewith, that the shooting of McDaniel was done by the prisoner or those whom he was aiding and abetting, under circumstances justifiahle or excusable, then you may acquit the prisoner.

If you are satisfied from the whole evidence, together with the statement of the prisoner at the bar, that when the parties met on the night of the occasion alleged in the indictment, McDaniel's party were the aggressors, and the accused endeavored to decline a struggle, but afterwards McDaniel and his party closely pressed them and they or either of them, to avoid their own destruction, shot McDaniel, it is homicide excusable.

As the sole judges of the evidence, it is for you to weigh the statements of the witnesses, their credibility, and the statement of the prisoner under oath before you, and you will determine how much you will receive as true, and how much you will reject, and after a careful review and consideration of all the facts and circumstances before you, render your verdict accordingly. You must, however, bear in mind in coming to your final conclusion that every reasonable doubt has been removed of the probability of guilt, for if there exist in your minds such a doubt, it is your duty to give this prisoner the benefit of it, and you will acquit him.

If you find the prisoner guilty, it is for you to say from the evidence whether he is guilty of murder in the first, second or third degree. If you believe from the evidence he is not guilty in either degree, you will return a verdict of not guilty.

Prisoner's counsel prayed for a new trial on the following grounds:

1. The verdict of the jury was contrary to the evidence.

2. The verdict of the jury was unwarranted by the evidence.

3. The verdict of the jury was unsustained by the evidence.

4. The court erred in overruling the pleas of abatement filed by the prisoner.

5. The court erred in reading the statutes of Florida passed in 1868 to the jury, defining murder in the first, second and third degree, and then telling the jury verbally, and not reducing it to writing before spoken to the jury, as to what was the punishment for murder in the first, second and third degree, and what the statute of 1868 said as to a general verdict.

6. The Court erred in not giving the following charges asked by prisoner's counsel to the jury, as follows:

1. A private person or persons are not authorized to arrest

for any offence, except the offence is committed in their immediate presence.

2. Neither is an officer authorized to arrest an offender of the law, unless the offence is committed in his immediate presence; all other arrests by an officer must be made by lawful authority. Lawful authority is a warrant issued by a judge, justice of the peace, or other officer empowered to issue warrants for arrests, and they must be founded upon an affidavit of some person making a specific charge of some offence against the laws of the land.

3. If you believe from the evidence that Erasmus McDaniel was not a constable or bailiff of Jackson county, but that he assumed to be a constable or bailiff, and possessed himself of the paper issued by the Justice of the Peace, George Robinson to Isaac King, for the arrest of Harrod Gillam, George Wilson, Sanders Tazwell and Richard Dukes, and called to his aid a posse, and arrested Harrod Gillam and George Wilson, that they broke his arrest, and fled from him, McDaniel and his posse, that McDaniel with his posse pursued them and were armed and arrayed in a warlike manner, and was seeking to arrest them again, with Sanders Tazwell and Richard Dukes, and while attempting the arrest of said parties by force he received a mortal wound, then you will acquit the prisoner.

4. If you believe George Robinson, a Justice of the Peace, of Jackson county, issued a paper purporting to be a warrant for the arrest of Harrod Gillam, George Wilson, Sanders Tazwell and Richard Dukes, for an offence charged to have been committed in Gadsden county, and without an affidavit made before him, charging an offence against said parties, that paper was no lawful warrant, but was void in law. And if you believe Erasmus McDaniel, the deceased, possessed himself of that paper and summoned an armed posse and was proceeding probably to arrest the parties therein named, he and all others assisting him were trespassing, and in arresting the parties committed a felony, and if they

attempted to arrest they were attempting to commit a felony, and the parties were justified in repelling him and his posse by force, and if deceased was killed or received a mortal wound from which he died, the defendant, if engaged in the repelling the deceased in his unlawful efforts to arrest him under said paper, would be justified, and you will acquit the prisoner.

If you believe from the evidence the deceased received a mortal wound, from which he afterward died, while engaged in an act that then was reasonable ground to apprehend a design on the part of deceased to commit a felony upon the prisoner and those with him, or to do some great personal injury to him or them, and there was imminent danger of such design being accomplished, you will find the prisoner not guilty.

It is false imprisonment for a private party or posse, a person who is not a constable, bailiff or other officer of the law, to arrest a party or parties, and is under our statute a felony, and if slain in the act or attempting its commission, is justified, and not guilty of any offence and will be acquitted.

If you have a reasonable doubt as to whether the deceased, when he died, died of the wound, or whether the deceased was an officer, or whether he had abandoned his design to false imprison any of the parties, you will give the prisoner the benefit of these doubts, but they must be reasonable doubts, not trivial.

It is not necessary that actual danger to prisoner did exist at the time the deceased was wounded to justify the injury, but if there was a reasonable ground to apprehend a design to commit a felony, or to do some great personal injury, and there should be imminent danger of such design being accomplished by the deceased and the parties acting with him, upon the prisoner and the parties with him, then you will acquit the prisoner.

If a man repel force by force in defence of his person,

habition or property, against one who manifestly intends or endeavors by violence to surprise, to commit a known felony such as murder, false imprisonment and the like, in those cases he is not obliged to retreat, but may pursue his adversary until he has secured himself from all danger, and if in so doing the party is killed, the killing is justifiable and the party will be acquitted.

The fact that deceased and his posse believed that they were acting legally when they were not, their belief will not justify their action in committing or attempting to commit a felony, and if killed while acting, the killing is justifiable and the prisoner will be acquitted.

7. The court erred in charging as to what was murder in the first degree under our statutes, merely giving the definition of murder at common law only.

8. The court erred in charging the jury that the killing proved, even though nothing be shown, the offence is murder, the burden of extenuation being then thrown on the accused.

9. The court erred in charging on the subject of the dying declarations of deceased and admitted as evidence, that they are admitted from the necessity of the case to identify the prisoner and to establish the circumstances of the direct transaction from which the death results.

10. The court erred in charging "the death being established by the proof before you, it is your duty to inquire if the decease came to his death by the unlawful act of the prisoner at the bar."

11. The court erred in charging the jury, "If you believe from the whole evidence beyond a reasonable doubt, the prisoner wilfully without any justifiable cause inflicted the wound on McDaniel, or aided and abetted in its infliction, and the wound was ultimately the cause of the death of McDaniel, you may find accused guilty."

12. And in charging that when acts are of an official character, or require the concurrence of official persons, a pe-

umption arises in favor of their execution, for everything is presumed to be duly and rightly performed, until the contrary is shown.

13. And in charging "so also a person who is generally known and admitted as a public officer may generally officiate without producing his commission or appointment, and his acts are '*prima facie* legal.'"

14. And in charging it is for you to determine from the evidence whether George Robinson, who issued the warrant exhibited on this trial, was authorized; and also whether McDaniel was authorized to officiate and execute the warrant.

15. And in charging, "If any one under color or claim of authority unlawfuly arrest or actually attempt or offer to arrest another he does so at his peril, and if the person whom he offers to arrest resists, and in his resistance kills the aggressor, it is not murder in the first degree, but may be of a lower degree according to the circumstances.

16. And in charging, "If from the evidence you are satisfied that McDaniel, having in his possession a warrant from Justice of the Peace George Robinson of Jackson county, for the arrest of Harrod Gillam, Richard Dukes, Willis Dukes, Sanders Tazwell and George Wilson, believed he was lawfully authorized to arrest the parties who were charged with a felony, and he so believing attempted to arrest them, then he was not so unlawfully acting as would constitute his act such an offence against the person as would have authorized these parties to resort to violence and extreme resistance,and if under such circumstances,andthose charged with him, did resort to violence which resulted in the death of McDaniel, it is homicide, and it is for you to say from all the evidence before you, in what degree."

17. The court erred in the charges given after the above paragraph, and the charge taken altogether is erroneous as to defining the several offences under the indictment as murder in the first, second and third degrees, and not fully

defining and charging the jury as to what was justifiable or excusable homicide under the 5th section of the act of 1868.

18. The court should grant the prisoner a new trial, because upon the evidence before the jury, the prisoner is not guilty of the offence found by the verdict of the jury.

Which motion being refused, the case was brought to this court by writ of error and the following grounds of error assigned:

1. The court erred in overruling the plea in abatement.

2. The court erred in not giving the charges asked for by defendant's counsel.

3. The court erred in reading the statutes of Florida passed in 1868 to the jury, defining murder in the first, second and third degree, and then telling the jury verbally, and not reducing it to writing before spoken to the jury, as to what was the punishment for murder in the first, second and third degree, and what the statute of 1868 said as to general verdict.

4. The court erred in charging the jury that the killing proved, even though nothing else be shown, the offence is murder, the burden of extenuation being then thrown on the accused.

5. The court erred in his charge as to the dying declarations of the deceased, that they were admitted from the necessity of the case to identify the prisoner and to establish the circumstances of the direct transactions from which the death results.

6. The court erred in charging the jury, "If you believe from the whole evidence, beyond a reasonable doubt, the prisoner wilfully and without any justifiable cause inflicted the wound on McDaniel, or aided and abetted in its infliction, and the wound was ultimately the cause of the death of McDaniel, you may find accused guilty."

7. The court erred in charging that when acts are of an official character, or require the concurrence of official persons, a presumption arises in favor of their execution, for

very thing is presumed to be duly and rightly performed ntil the contrary is shown.

8. And in charging, "So also a person who is generally nown and admitted as a public officer, may generally offi- iate without producing his commission or appointment and is acts are prima facie legal."

9. And in charging, "It is for you to determine from the vidence whether George Robinson, who issued the warrant xhibited on this trial, was authorized; and also whether IcDaniel was authorized to officiate and execute the war- ant."

10. And in charging that, "If any one, under color or laim of authority, unlawfully arrest or actually attempt or ffer to arrest another, he does so at his peril, and if the per- on whom he offers to arrest resists and in his resistance kills ie aggressor, it is not murder in the first degree, but may e of a lower degree, according to the circumstances."

11. The court erred in charging, "If from the evidence ou are satisfied that McDaniel, having in his possession a arrant from Justice of the Peace George Robinson of Jack- on county, for the arrest of Harrod Gillam, Richard Dukes, Villis Dukes, Sanders Tazwell and George Wilson, believed e was lawfully authorized to arrest the parties who were harged with a felony, and he so believing attempted to ar- est them, then he was not so unlawfully acting as would onstitute his act such an offence against the person as would ave authorized these parties to resort to violence and ex- reme resistance, and if under such circumstances, and those harged with him, did resort to violence which resulted in ie death of McDaniel, it is homicide, and it is for you to y from all the evidence before you in what degree."

12. The court erred in the charges given after the above aragraph, and the charge of the court taken altogether is roneous as to defining the several offences under the in- ictment as murderer in the first, second and third degree, and

not fully defining and charging the jury as to what was justifiable homicide under the 5th section of the act of 1868.

13. The court should grant the prisoner a new trial, because upon the evidence before the jury, the prisoner is not guilty of the offence found by the verdict of the jury.

14. That the charge of the court was calculated to confuse and mislead the jury and did mislead them.

J. F. McClellan, for Appellant.

1. The first error assigned is well taken. See section 10, acts of 1868, p. 18. This section provides for filling up the Grand Jury where there is a "deficiency," and an open venire should have issued. The court proceeded under the 32d and 35th section, page 21, which provides for filling up the Grand Jury where there is a failure to "summons" the whole number. This was error, and the court further erred in requiring the Clerk, County Judge and Sheriff to draw the jurors, when it should have been done by the Clerk alone.

2. The second error is well taken. The charges asked for were proper. The evidence in the case shows that deceased, E. McDaniel, was not an officer of any kind and that he had no legal warrant in his possession. As to when a sheriff or private person may arrest: Wharton's Cr. Pl. and Pr., 88 and 97, 13 Fla., 680. McDaniel, in attempting to arrest, was guilty of false imprisonment (see act of 1868, sec. 18, page 91, as to assuming to be a constable;) acts of 1868 page 68, section 43. As to justifiable homicide and manslaughter, acts of 1868, page 63, section 5, 13.

3. The third error is well taken. This error is covered by the ruling of the Supreme Court in this State. 13 Fla. 649 and 650.

4. This error is well taken. The charge excludes the jury from fully considering the evidence in the case offered by the State to ascertain whether there was not extenuating

justifiable grounds proven by the State. Dixon vs. the State, 13 Fla., 637, 647; Ib., 629.

5. This error is so clearly against law that it is not necessary to recite authorities upon it. It was calculated to give the dying declarations greater weight than they were entitled to.

6. This charge excluded from the jury their right to consider the grade of the offence as it was determined by the evidence. The killing might be wilful and not murder in any degree. It might have been manslaughter. See acts of 1868. It is too broad and too indefinite.

7. There was no evidence in the case to justify this charge. The evidence showed McDaniel was not an officer.

8. The same objection arises to this charge.

9. The 9th error is akin to the 7th and 8th.

10. There was no evidence to justify this charge.

11. The court in his charge here assigned as error is in conflict with that assigned in the 10th. And the charge is erroneous because there being no evidence that McDaniel had any color of title to being an officer, the charge was highly improper. If a private individual makes or attempts to arrest. he is a trespasser and commits a felony. Nothing can justify his acts or excuse him, unless when the party commits a felony in his presence.

12, 13 and 14. The court by its charge wholly excluded from the consideration of the jury whether the evidence in the case reduced the killing if proved to be murder in the second and third degree, or to be manslaughter in the first, second, third and fourth degree, or to be justifiable homicide.

Cocke, Attorney General, for Appellee.

The court below decided correctly in refusing a new trial.

There was no objection raised as to the admissibility of testimony.

There was objection raised that the prisoners jointly indicted with the defendant were not admitted as witnesses.

The court decided correctly on this point. Wharton's [illegible] American Crim. Law, 6 ed., vol. 1, marginal page 790; 1 [illegible] Greenleaf on Ev., section 363.

The plea in abatement was properly overruled. It was [illegible] offered under the statute defining the duty and powers of [illegible] of grand jurors. The plea was defective in not stating that no [illegible] no *venire facias* was ordered. 22d section, page 21 of the act [illegible] act relating to jurors, acts 1868. The plea is not sustained by [illegible] by evidence, and the presumption of law is that the record dis- [illegible] discloses the fact, which is, that the presentment was made by [illegible] by a competent grand jury.

The second assignment of errors and also the third is an- [illegible] answered by reference to the charge delivered by the court be- [illegible] below. The definition of murder as given in the charge is cor- [illegible] correct, and agrees with the statute of 1869. 1 Russell on Cr. [illegible] Cr., marg. p. 482.

The charge as to homicide is in accordance with the statute [illegible] ute of 1868.

If the appellant would obtain the benefit of the law for [illegible] for the punishment of homicide, he should have proven alle- [illegible] le- viating circumstances. 1 Russell on Crimes, marg. p. 483 [illegible] 83.

The fourth exception is not well taken; the authorities [illegible] ies sustain the charge as correct. 1 Russell on Crimes, 483 and [illegible] nd notes; 2 How., 656; 9 Met., 93; Hill's case, 2 Grattan, 594 [illegible] 04; 11 Ga., 615; S. & M., 403.

Homicide with intent to kill is murder. 3 Selden, 385 [illegible] 85; 2 Wharton, section 944.

The fifth charge was proper. 2 Russell on Crimes, sec- [illegible] ec- tion 944-5.

The sixth ground of error cannot be sustained. The [illegible] he charge is in accordance with the act of the Legislature. Act [illegible] ct of 1868, p. 63, section 1.

The seventh, eighth and ninth grounds of exception are [illegible] e clearly against recognized authorities on the subject. The [illegible] e points embraced in these grounds of error are decided by the [illegible] e

testimony of record in this case, and are presented for the court to decide.

In reference to the other points resting upon the evidence of record in this case, the Attorney General confined his argument to the record.

From the testimony it was evident that McDaniel, though not legally appointed as bailiff, nevertheless had in his hands a warrant authorizing him to arrest the prisoner, and the prisoner did not know that he was not an afficer; nor does it appear that McDaniel knew that he was not an officer.

The prisoner could not question the lawful authority of a person with a warrant in his hands, legally issued.

Killing a person engaged as McDaniel was may be homicide. The instruction of the court, however, was in conformity to the most approved text writers, as well as modern decisions, upon which the authority of 2 Wharton, sec. 944, and cases therein cited, is again referred to.

There are some grounds set forth in the assignment of errors which are not contained in the bill of exceptions, and which could not have been inserted, because resting upon points of evidence not offered before the court below, nor offered in proof by way of mitigating the punishment from murder to homicide.

RANDALL, C. J., delivered the opinion of the court.

The first question which arises in this case, under the assignment of errors, is whether the plea in abatement to the indictment should have been sustained. The plea sets up substantially that there was a deficiency of grand jurors on the first day of the term, and that to supply such deficiency the court ordered the names of ten persons to be drawn from the list of jurors furnished by the Board of County Commissioners, which was done by the County Judge, the Clerk of the Circuit Court and the Sheriff, instead of by the Clerk alone; that on the second day of the term, one of the personswho had been regularlydrawn and summoned asa grand

juror not appearing, the sheriff summoned one of the persons drawn on the first day of the term in his place. The statute controlling this subject provides that "in case of a deficiency of grand jurors in any court, writs of *venire facias* may be issued to the proper officer to return forthwith such further number of grand jurors as may be required." The law authorizes a special venire in case of a deficiency of grand jurors, and without prescribing any method by which the persons are to be selected, simply provides that it shall direct the proper officer "to return forthwith" the required number of grand jurors. It is not denied here that there was a "deficiency" within the meaning of the law. It is not denied that the venire was properly issued, or that it was served by the proper officer. The point made is that the sheriff, in selecting the individual, was not left entirely unrestricted in the exercise of his judgment, but was confined in his selection to one of ten men who, upon a previous day, had been drawn and selected from the persons designated as suitable to be jurors for the year by the authority upon whom that duty devolved. It is apparent that the law does not prohibit this limitation by the court of the judgment of the sheriff in the matter of selection. It does no more than direct him to return enough men to make up the deficiency, prescribing no method of selection and leaving the power and authority of the court over the matter unrestricted.

The whole matter is, therefore, reduced to this question: Can the court under such circumstances thus direct the sheriff?

Under our jury system, the law contemplates an annual selection of three hundred persons from the list of registered voters, who are to constitute the body from which the several juries are to be drawn, and in selecting persons from this number to constitute grand and petit jurors, the law is so framed as to render it impossible for any officer of the court to organize a jury in which there is a single person who has been arbitrarily chosen or selected by him. We

hus see that the general purpose of the Legislature was to ondemn the system of open venires, and restrict the officer ı his selections to persons designated as suitable by another ower, such designation being made by a drawing where here was no opportunity of knowing who would be the per- on selected. In the present case the court, instead of per- ıitting the sheriff to make his selections from the body of he county, restricted him to such men as had been selected or the year and to a number drawn by the clerk, sheriff and ounty judge, in the manner provided for drawing the orig- nal jurors. There is no statute which prohibits this. There s no statutory provision to the effect that this selection shall e left to the discretion of the officer. This action of the ourt is in entire harmony with the spirit and intent of the aw, is within its inherent power over the subject-matter, and ubserves a good purpose in preventing the summoning of urors who are loitering about the court house from idle cu- iosity, often with the desire and purpose of being selected ı order to receive the compensation attached to the discharge f such duty. In the absence of any statute controlling the ıatter, we think it was clearly within the power of the court ɔ adopt a rule, and we think the rule here adopted, being ı entire conformity with the theory upon which the whole ystem is based, was eminently proper.

The appellant assigns as further error in the proceed- ıgs and trial, that the court refused to give the jury the in- tructions asked for by him, and that the court read from ıe statutes of 1868 the statutory definition of murder in the rst, second and third degrees, and then instructing the jury erbally, and not reducing it to writing, as to the punish- ıent prescribed for the crime, and what the statute said as ɔ a general verdict.

We cannot discover these alleged errors, because it no- vhere appears in the record that the appellant asked that he instructions should be given to the jury, or that the

judge read from the statute, or that he gave them any verbal instructions. It is true that counsel in his motion for a new trial made these matters grounds of his motion, and that the motion was denied; but whether it was denied upon the merits of the ground relied upon, or because no such instructions were prayed for, or that the other assumed facts did not exist, does not appear. The record should show affirmatively that the alleged proceedings and facts relied upon actually occurred, that the appellant excepted thereto. The recital in the motion made to the court is not evidence to us that the grounds of the motion had any existence in fact.

The other grounds relied on by the appellant for a reversal of the judgment are that the court refused a new trial upon the alleged erroneous instructions to the jury in the charge of the court, which is given at length. The material points are that the court instructed the jury as follows: "The killing proved, even though nothing else be shown, the offence is murder; the burthen of extenuation being then thrown on the accused;" and, "If you find the prisoner guilty, it is for you to say from the evidence whether he is guilty of murder in the first, second or third degree. If you believe from the evidence he is not guilty in either degree, you will return a verdict of not guilty."

The jury under this instruction found the appellant guilty of murder in the first degree.

The statute of 1868, upon the subject of homicide, provides as follows:

"The killing of a human being, without the authority of law, by poison, shooting, stabbing or any other means, or in any other manner, is either murder, manslaughter or excusable or justifiable homicide, according to the facts and circumstances of each case.

"Such killing when perpetrated from a premeditated design to effect the death of the person killed, or of any human being, shall be murder in the first degree; * * *

when perpetrated by any act imminently dangerious to others, and evincing a depraved mind, regardless of human life, although without any premeditated design to effect the death of any particular individual, shall be murder in the second degree; * * when perpetrated without any design to effect death, by a person engaged in the commission of any felony shall be murder in the third degree.

"The killing of one human being by the act, procurement, or omission of another, in cases where such killing shall not be murder according to the provisions of this chapter, is either justifiable or excusable homicide or manslaughter."

The statute then proceeds to define what shall be deemed justifiable or excusable homicide, and manslaughter, the latter being divided into four grades or degrees.

This court on several occasions had held that such an instruction as that given in this case is erroneous, to-wit: "the killing being proved, even though nothing else be shown, the offence is murder, the burthen of extenuation being then thrown on the accused."

In Holland vs. the State, 12 Fla., 117, Gladden vs. the State, 13 ib., 623, and Dixon vs. the State, ib., 637, it is laid down that the killing being proved, all the circumstances of accident, necessity or infirmity, are to be satisfactorily proved by the prisoner, *unless* they arise out of the evidence produced by the prosecution. The instruction given limits the defence to the facts which he shall be able to produce, and deprives him of the benefit of the evidence adduced by the State, which, perchance, may have shown that the killing was excusable or justifiable, or that the crime was manslaughter, and is too clearly error to require any further demonstration than the mere statement of the proposition.

But we are not satisfied that the rule as stated in the two cases last referred to is correct in another respect. In the case of Holland vs. the State, the rule of the common law as to the burthen of proof was correctly given. That case occurred before the enactment of the law of 1868, which de-

fines the crime of murder in the several degrees into which it is thereby divided, and the crime of manslaughter, which it also divides into several grades; and the several classes of justifiable and excusable homicide, which it also defines with much particularity. But the cases of Gladden and Dixon, though occurring since the passage of the act referred to, were decided upon the exception taken that the charge of the court deprived the accused of the benefit of a defence which may have been found in the testimony adduced by the State, and without reference to the changes wrought by the recent statute, the language of which we have quoted above.

In the cases of Gladden and Dixon we gave the rule, as we understood it, of the common law, which rule we think is essentially changed by this statute. In those cases we held substantially that the fact of killing being proved, the offence of murder is established, and the accused must show the circumstances reducing the crime to a lower grade, or that the killing was justifiable or excusable, unless such circumstances appeared from the proofs on the part of the State. In considering the statute, it seems to us that this rule of the common law, as to the implication of premeditation and malice as a legal deduction from the mere proof of the act which results in death, is essentially superseded, and that under this statute no man may be convicted of murder without due proof that the crime has been committed, or, in other words, that the proof of the act must be such that malice may be legitimately inferred by the jury as a question of fact "from the circumstances of the case." For, says the common law, if one man kill another, the offence is murder, malice being presumed from the fact of killing. But, says the statute, "the killing of a human being without the authority of law, is either murder, manslaughter or excusable or justifiable homicide, according to the facts and circumstances of each case." And then the statute goes on to say what character of facts and circumstances shall constitute each particular degree of crime, or justifiable or excusable homicide.

If every homicide shall be presumed to be murder until the perpetrator show that the act is not murder, this emasculates the statute; for the design of the statute is to require that the degree or quality of crime shall be established by the proofs. The common law says the killing is murder; the statute says the *unlawful* killing is murder, manslaughter, or not criminal at all, according to the facts and circumstances. And so it is to be ascertained from *all* the facts and circumstances whether any crime has been committed, and it cannot therefore be allowed that a man shall be adjudged guilty of the highest crime upon proof of only one of the ingredients, the single fact of killing being but one ingredient of the crime. The very terms of the classification of the different degrees of murder and manslaughter, and of justifiable and excusable homicide, requires something more than the proof of the killing, because it cannot be determined without a consideration of all the "facts and circumstances of each case" whether the act be murder or manslaughter, or the criminal intent be entirely wanting. The *degree* of crime, the *quality* of the act, must, under this statute, be determined, not alone upon a general presumption from an act, but upon the application of reason and judgment to all the facts proved, and thus to determine with what mind and intent the act was committed. It is not assumed that all presumptions must be ignored, or that no presumptions can be invoked in establishing the criminal intent, but only that under this statute the presumption must be one of fact, to be drawn by the jury from the proof of the circumstances attending the homicide, and not from the homicide alone. The principle involved is that all presumptions are in favor of innocence, and that the animus must be inferred from the manner of the commission of the act, and the conduct of the accused, and other circumstances of the case.

The indictment in this case charges specifically that the accused "feloniously, wilfully, without authority of law,

from a premeditated design to effect the death," &c., in the very language of the statute. The act is substantially a transcript of the statute of New York, and it was held in People vs. White, 24 Wend., 520, that where, in an indictment for murder, the crime is charged to have been committed with a premeditated design to effect the death of the person killed, the premeditated design, or express malice, must be proved, although the act be also charged to have been done with malice aforethought. Such a description cannot be rejected as surplusage. (See also State vs. Turner, Wright, Ohio, 30.)

In a recent case in the Court of Appeals of New York, (Stokes vs. the People, 1873,) the court, Grover, J., says: The instruction in effect was that the law implied motive, and consequently the crime of murder in the first degree from theproof of killing the deceased by the prisoner,and that upon this proof they should find him guilty of that crime, unless he had given evidence satisfyingthem that it was manslaughter or justifiable homicide. * * * This rule can be upheld by authority only, as it is obviously in contravention of principle and the analogies of the law. It is a maxim in the law that innocence is presumed until the contrary is proved. How is guilt established by proof of only one of the ingredients essential to constitute crime? To constitute crime there must not only be the act, but also the criminal intention, and these must concur, the latter being equally essential with the former. *Actus non rerum facit, sed mens,* is a maxim of the common law. The intention may be inferred from the act, but this, in principle, is an inference of fact to be drawn by the jury, and not an implication of law to be applied by the court. (For a very able and interesting discussion of the subject, we refer to the American Law Review, October, 1873, Boston.)

It will be noticed that the judge further charged the jury, "If you find the prisoner guilty, it is for you to say from the evidence whether he is guilty of murder in the first, sec-

id or third degree. If you believe from the evidence he not guilty in either degree, you will return a verdict of not uilty." This is manifestly erroneous, for in terms the jury e precluded by this instruction from finding the accused uilty of manslaughter in one of its degrees, and hence, as ey did not find him guiltless, they were forced to find him uilty of murder. The court should have given to the jury e provisions of the statute as to the crime of manslaughter, id allowed them to find a verdict of manslaughter if they w fit.

The judgment of the Circuit Court is reversed, and a new ial awarded.

COB BROCK, APPELLANT, VS. ALVIN D. GALE, APPELLEE.

The Legislature appointed a term of the Circuit Court to be held on the the same day in two counties in the same circuit; *Held*, that a term might be held in either county on the day designated.

In a suit against a carrier of passengers upon a steamboat for the loss of baggage, the plaintiff claimed for the loss of a set of dentist's instruments and special damages in the loss of the profits and earnings which he might have made if the instruments had not been lost. *Held*, upon demurrer, that such special damages could not be recovered, but only such damages as were contemplated or might reasonably be supposed to have entered into the contemplation of the parties to the contract of carriage.

It is a question for the jury to determine what articles of property as to quantity, quality and value contained in a passenger's trunk or valise, may be deemed baggage, (subject to the power of the court to correct any abuse;) and it is improper for the judge to designate by name what articles may be included in the term *baggage* of a traveler.

The goods contained in the trunk, &c., of an ordinary passenger, traveling upon a steamboat, are not the goods of a "shipper" of freight or baggage within the meaning of the 69thsection of an act of Con-

gress, entitled "an act to provide for the better security of life," &c., approved February 28, 1871.

This is an appeal from the judgment of the Circuit Cou for Duval county.

Gale, plaintiff, sued Brock, defendant, to recover the valu of a valise and its contents as the baggage of plaintiff, wh was a traveling dentist who took passage on defendant's steamer Darlington, on the St. John's river, the valise having been lost on or before the arrival of the boat at its wharf in Jacksonville. The valise, as alleged, contained a set of dentist's instruments of more than ordinary value, ornamented with gold and jewels, and some articles of clothing.

The first count of the declaration was a special allegation that plaintiff paid his fare as a passenger on defendant's steamboat and delivered his valise and contents to defendant's servants on the boat, notifying them that it was very valuable, (annexed was a schedule of the property valued at $555.18,) and alleged its non-delivery at the place of destination.

The second count alleged that the dental instruments were necessary to the pursuit of his business as a dentist and were a part and parcel of his necessary baggage and effects as a traveling dentist, and that the loss thereof had subjected him to great loss and damage, in the inability of the plaintiffe to pursue his profession,to-wit,for six months,and thereby to make a livelihood and support, to his damage $10

Third count, for goods sold and delivered.

Fourth count, on account stated.

The defendant pleaded that he was not indebted a leged; that he did not promise as alleged; that the were not delivered into his custody; that the goods w little value; and that the dental instruments were no gage;" and defendant demurred to the second co the ground that the damages alleged were too remote plaintiff can recover if at all only the value of the

nd not the alleged consequential damages for loss of time
id business.

The demurrer was argued and overruled by the court, to
hich defendant excepted.

Trial upon the issues joined and verdict for plaintiff
›r $764.39.

Motion for new trial by defendant denied, and judgment
ıtered upon the verdict.

Fleming & Daniel for Appellant.

The first error assigned is that the court erred in denying
›plication for a continuance.

This motion was made on the ground that the Legislature,
ı declaring by the act of February 19, 1873, that the Courts
: Duval and St. Johns should be held on the same day, had
›mmanded an impossibility, as the courts could not be in
vo places at once, and therefore was void. This point is
ıbmitted without argument.

The second error assigned is that the court erred in over-
ıling demurrer to second count in plaintiff's declaration.
his is a count for what plaintiff might have made in six
ıonths time, lost by reason of the losing of his dental in-
ruments.

The early cases in both the English and American courts
:nerally concurred in denying profits as any part of the
ımages to be compensated,and that whether in cases of con-
act or tort. Sedgwick on Damages, 5th ed., p. 69.

We admit that the late decisions modify this rule.

Mr. Sedgwick says: "Indeed on reviewing the whole
ıbject, it seems to me that the Louisiana Code expresses
ıe true rule and that it is no more than justice that a de-
:ndant in default should be compelled to make good the
ımages sustained by his breach of contract, which were
›ntemplated or may be reasonably supposed to have entered
ıto the contemplation of the parties at the time of the con-
'act." Sedgwick on Damages, 77.

The rule as laid down in the leading English authorities is, "When two parties have made a contract, which one of them has broken, the damages which the other party ought to receive in respect of such breach of contract should be either such as may fairly and substantially be considered as arising naturally, i. e. according to the usual course of things from such breach of contract itself, or such as may reasonably be supposed to have been in contemplation of both parties at the time they made the contract, as the probable result of the breach of it. Now, if the special circumstances under which the contract was actually made were communicated by the plaintiff to the defendant and thus known to both parties, the damages resulting from the breach of such a contract, which they would reasonably contemplate, would be the amount of injury which would ordinarily follow such a breach of contract under those special circumstances so known and communicated. But on the other hand, if those special circumstances were wholly unknown to the party breaking the contract, he at the most could only be supposed to have had in his contemplation the amount of injury which would arise generally, and in the great multitude of cases not affected by any special circumstances for such breach of contract. For had the special circumstances been known, the parties might have expressly provided for the breach of contract by special terms as to the damage in that case, and of this advantage it would be very unjust to deprive them. The above principles are those by which we think the jury ought to be guided in estimating the damages arising out of any breach of contract." Hadley vs. Baxendale, 9 Exch., 341, cited in Sedgwick on Damages, 78.

The rule adopted in Hadley vs. Baxendale is an affirmation of the law as laid down by Sedgwick. See note 1, on page last quoted.

In Griffin vs. Colver, 16 N. Y., 489, called by Sedgwick the leading American case on this subject, the same doctrine is held. The same doctrine has been recognized or adopted

in 2 L. T., (N. S.,) 170; 1 L. R., (C. P.,,) 329; 28 N. Y., 72; 15 Wis., 318; 13 ib., 31; 13 Md., 314; 33 Vt., 92; 5 N. C., 299; 11 Texas, 44; 4 Cal., 392; 6 Cal., 19; cases cited in note on pages 79 and 80, Sedgwick on Damages.

In Anderson vs. The North Eastern Railway Co., 4 L. T., (N. Y.,) 216, the Court of Exchequer refused to apply the rule in Hadley vs. Baxendale to a Railway Co., sued as warehousemen only so as to imply any notice from the mere deposit of the parcel which should affect the warehouseman beyond the value of the article.

And if through the negligence of the carrier or other party to the contract, some damages are sustained within the rule in Hadley vs. Baxendale, yet if through neglect of the duty which the law imposes on the injured party of making reasonable exertions to render the injury as light as possible, the damages are unnecessarily enlarged, the increased loss falls on him. Hamilton vs. McPherson, 28 N. Y., 72.

In Jones vs. Boyle, 1 Stark., 493, Baron Alderson remarks that "the damages to be recovered by the plaintiff were such as might be reasonably supposed to have been in contemplation of both parties at the time the contract was made, as the probable result of the breach of it in the bulk of broken contracts had no application, though proper to be taken into consideration by *carriers and their customers.*"

We call to the special notice of the court the discussion of the cases bearing on the point under consideration, found in the notes on pages 79, 80, 81, &c., Sedgwick on Damages.

Now to apply this law to our case, the jury undoubtedly based a portion of their verdict on what the plaintiff would have earned in the time he alleges he was idle for want of the instruments. This is evident from the informal, itemized verdict first rendered by the jury, and afterwards corrected as to form by the court.

There is no evidence to show that the defendant or his agent knew anything about the calling or occupation of the plaintiff, or the kind, or character of the contents of the

valise. Damages, therefore, in the nature of what a dentist might earn in one or six months, was not, and could not have been contemplated by the parties at the time.

Will the law countenance any such injustice as to make the defendant suffer because the plaintiff chose to remain idle instead of purchasing another set of instruments, and thereby doing what the court declares in Hamilton vs. McPherson, 28 N. Y., it was his duty to do, i. e., "to use reasonable exertion to render the injury as light as possible?"

As to whether a dentist would make money at any particular time is dependent upon too many contingencies to make it a rule for damages, and too remote from the original contract.

The third assignment is that the court erred in admitting illegal testimony. If the principles which we have invoked are established law, then all questions seeking to ascertain what plaintiff could have earned had he not lost his instruments were illegal, and the answers thereto inadmissible.

The fourth and fifth assignment of errors we submit without argument.

As to the sixth assignment of errors, we contend that the court erred in refusing to give the fourth charge asked for by the defendant's counsel. The court was asked to charge the jury:

"4. That if it appears by the evidence that the contents of the valise in question were not such as is ordinarily carried by a passenger for his personal convenience, then plaintiff cannot recover."

That the authorities cited as supporting this charge, to-wit: Angell on Carriers, 100 and 101; 1 Parsons on Contracts, 719, 720, fully sustain it, and it was error for the judge to refuse the charge, as it was good law and applicable to the case.

Of the fifth and sixth instructions asked for by the defendant and refused by the court, the same may be said.

Refusing these charges had a tendency to impress the jury

with the idea that it was their duty to find the defendant liable, no matter what might be the nature of the contents of the valise.

While the law is as laid down by Parsons and sustained by the best authorities, "that the common carrier of passengers is not liable as such for the loss of their baggage beyond that amount which he might reasonably suppose such passenger would carry with him, nor for property such as is not usually included within the meaning of baggage. Thus not for goods carried by way of merchandise, nor for a larger sum of money than the passenger might reasonably take on such a journey for his expenses. But there may be special articles as fishing gear of sporting apparatus which one carries for his amusement, and in these and other cases it may often be very difficult to draw the line between what would come within the liability of the carrier and what would not; the question would not only be materially affected by circumstances, but is one of those upon which different individuals would be very likely to differ, and perhaps it is impossible to fix upon anything like a definite standard. But the principle is plain enough and the reason and justice of it are undeniable. And the difficulty in the application of the principle, whether by the court or the jury, is of a kind which must often occur in the administration of the law. It must always be a question of mixed law and fact where the court states the principle and illustrates its bearing upon the case at bar as it sees fit, and the jury apply the principle so stated as best they can." 1 Parsons on Con., 3d ed., 720, 721, 722.

The question for this jury to consider was, whether dental instruments were baggage, and whether it was reasonable to suppose that this dentist, traveling in the woods of Florida, would have a jeweled set of instruments worth three or four times an ordinary set, and whether the defendants should be made to pay for them.

It was due to the defendant that the questions at issue

should have been fairly put before the jury, which was not done, we respectfully contend, by the court below.

The court erred in refusing the last charge asked for by defendant. This charge was intended to apply the 69th section of the act of Congress of February 28th, 1871, 16 U. S. Statutes at Large, p. 458, 459, to the case at bar.

This act contains many provisions of great stringency, enforced by severe pains and penalties. The 69th section we contend was intended to modify and change the liability of carriers, and while most of the provisions are far the benefit of the passengers and shippers, this section is for the protection of the steamboat. The language is, "if any shipper of diamonds or other precious stones, gold or silver, in manufactured or unmanufactured state, gold or silver plate, or plated articles,shall lade the same as freight or *baggage,*without written notice of the true character and value of the same, the carrier shall not be liable."

We contend that since the passage of this law, jewelry in a trunk, or jeweled instruments plated with gold or silver plate, cannot be sued for and the value thereof recovered without the previous written notice required by the statute. "Shall lade the same as freight or *baggage.*" Baggage means trunks and other articles carried by a passenger, something accompanying and attending the person.

In conclusion, we again ask this court to consider how broad and uncertain a rule will be established if it is held that damages so remote and contingent as what plaintiff could have made as a dentist, if he had not lost his instruments, are the damages for which a carrier is liable, who loses a valise containing the instruments of a dentist, which valise was received without notice of its contents.

If this be law, then if an attorney going to argue a case at Palatka, on an agreed fee of two thousand dollars for the argument, through the negligence of the carrier his trunk worth ten dollars, and his law books and brief worth one hundred dollars, are lost. Owing to the loss of his brief and

books he cannot make the argument and loses his fee; he sues the carrier. Ought the two thousand dollars which he might have made had his trunk not been lost, and had he made the argument, and had his client fulfilled his promise, to be considered as damages legally recoverable out of the carrier?

Is not the case at bar similar in principle?

Cooper & Ledwith for Appellee.

RANDALL, C. J., delivered the opinion of the court.

The first error assigned is, that the court refused to grant a continuance on defendant's motion, made upon the ground that the time of holding the court was not a legal term, because a term was appointed by the law to be held on the same day in St. Johns county and Duval county in the same circuit.

If the ground of the motion was valid, to-wit: that there was no legal term being held, the court could not act at all, and therefore could not make an order of continuance. If the ground of the motion was not valid, the continuance was properly refused. It is true that the court could not sit in both counties at the same time, but it does not follow that it could not sit in one county. The court was sitting in Duval, and was therefore not sitting in St. Johns. The Judge held the term in Duval at the time named in the law for that purpose, as we think he might lawfully do.

Second. The appellant says the court erred in overruling defendant's demurrer to the second count in plaintiff's declaration, and third, in admitting illegal and irrelevant testimony under said second count.

The question here presented is, whether the plaintiff could, in this action against a common carrier for the loss of his baggage, he being a traveller upon the defendant's steamboat, recover damages for the loss of the profits which he might have made in the practice of his trade or profes-

sion, if his baggage, including the implements of his trade, had not been lost. The third exception arises upon the questions put by plaintiff's counsel on the trial to the plaintiff as a witness in his own behalf, as to whether he was detained at Jacksonville in consequence of the loss, and what were his monthly receipts from his business at home, and whether he was prevented by the loss of his instruments from pursuing his profession and for what length of time. The court permitted the questions to be answered, notwithstanding defendant's objections. Witness answered that his receipts for several years had averaged three hundred dollars per month, or at least three thousand dollars per year; that he was prevented by the loss of his instruments from pursuing his business to some extent for one month, and had never since been as well able to pursue his business for want of those statements.

The law in such cases is laid down by Sedgwick in his book on the measure of damages as follows: "On reviewing the whole subject, it seems to me that the language of the Louisiana Code expresses the true rule; and that it is no more than justice that a defendant in default should be compelled to make good the damages sustained by his breach of contract which were contemplated, or may reasonably be supposed to have entered into the contemplation of the parties at the time of the contract."

Under ordinary circumstances the damages flowing from a breach of contract to carry and deliver goods would be the value of the goods at the time of the loss and interest on the amount. If the owner of the goods would charge the carrier with any special damages, he must have communicated to the carrier all the facts and circumstances of the case which do not ordinarily attend the carriage or the peculiar character and value of the property carried, for otherwise such peculiar circumstances cannot be contemplated by the carrier. "For (says the court in Hadley vs. Baxendale, 9 Exch., 341,) had the special circumstances been

nown, the parties might have expressly provided for the reach of the contract by special terms as to the damage in hat case, and of this advantage it would be very unjust to leprive them. These principles are those by which we think he jury ought to be guided in estimating the damages rising out of any breach of contract." And in Griffin vs. Colver, 16 N. Y., 489, Judge Selden states it thus: "The damages must be such as may fairly be supposed to have ntered into the contemplation of the parties when they nade the contract—that is, they must be such as might aturally be expected to follow its violation; and they must e certain, both in their nature and in respect to the cause rom which they proceed."

In the present case there is no room for pretense that the efendant contemplated that the plaintiff would sustain any damage beyond that which would follow the loss of any kind of baggage; *i. e.*, the value of the goods and the expense of a brief detention in endeavoring to find them, with nterest. The defendant cannot be chargeable for the loss of dentist's tools beyond what he would be liable to pay ny other passenger for the loss of any goods of like value, nless he has especially agreed to be responsible for other oss or damage. Doctor Gale did not inform the defendant hat he was a dentist; that his tools were set with diamonds nd rubies, or that in case they should be lost he would be nable to pursue his avocation for six months or for one nonth; and hence the defendant did not contemplate any such risk in carrying him as a passenger upon his steamboat, with his valuable baggage.

The court therefore erred in overruling the defendant's demurrer to the second count in the declaration, and in admitting testimony as to the probable earnings of the plaintiff as a measure of damages for the loss of the goods, and the court should have charged the jury in such manner as to confine their inquiries upon this subject to the rule we have indicated.

The fourth and fifth errors assigned are, that the court erred in its charge to the jury, and in charging the jury as requested by the plaintiff.

It is unnecessary to elaborate upon these propositions. In examining the record we find that the Judge's charge is in the main correct, except in its too general language as to the allowance of damages, already alluded to. It is not entirely proper, however, for the Judge to specify what particular articles of property, designating them by name, may be included in the term "baggage," as this comes very nearly to an argument and opinion upon the proofs in the case. For instance, in giving the fourth instruction asked for by plaintiff to the jury, this language was used: "Thus a carpenter's tools have been held suitable baggage for a carpenter, a surgeon's instruments for a surgeon." While it is true that courts have refused to set aside a finding of jury to that effect, on the ground that "it is for the jury to decide whether the articles contained in the plaintiff's valise, for which payment is claimed, are such property as may be deemed baggage," (as the jury were instructed on the request of the defendant,) it is not proper for the court to suggest, by way of example, that which may influence the jury upon the question of fact they are to try.

The sixth error assigned is that the court refused to charge the jury, as requested by the defendant's counsel. The instructions asked by the defendant's counsel were given by the court, except the 4th, 5th, 6th and 7th, and of these, all except the 7th had already been given in substance. It is not error to refuse to repeat a charge already given.

The seventh instruction asked by defendant's counsel is in these words: "If it appears that the valise in question contained jewelry or precious stones, or instruments set with gems, precious stones, or gold, or other precious metals, or gold or silver plated or mounted instruments, and that no written notice of the character and value of the

same was given to the master, clerk, agent or owner of defendant's said steamboat, then defendant is not liable for the same as a carrier." This was refused by the court. It is insisted by the defendant that this instruction should have been given according to the provisions of the 69th section of "An act for the better security of life, &c.," passed by the U. S. Congress, and approved Feb. 28, 1871, which provides, "if any shipper or shippers of platina, gold, gold dust, silver, bullion or other precious metals, coins, jewelry, bills of any bank or public body, diamonds or other precious stones," and other like articles enumerated, "contained in any parcel or package or trunk, shall lade the same as freight or baggage on any boat or vessel, without at the time of such lading giving to the master, clerk, agent or owner of such boat or vessel receiving the same, a written notice of the true character and value thereof, and having the same entered on *the bill of lading therefor,* the master and owner or owners of said boat or vessel shall not be liable as carriers thereof."

It seems clear, however, that this section refers to property of the descriptions mentioned, sent by shippers of such goods in the common mercantile acceptation of the words *shipper or shippers,* who forward goods as freight or baggage under bills of lading, and that the act had in view the protection of the revenue of the United States, as well as the protection of vessels against fraud and against the penalties for violations of revenue laws. The language used does not well apply to a passenger who carries in his trunk his ordinary wearing apparel, ornaments and professional implements, however rare or valuable. He is not a shipper, and does not "lade" a vessel as a shipper, nor give or receive a bill of lading for his personal baggage, nor pay freight thereon, as does a shipper. We do not think the court erred in refusing to give the instruction.

The court charged the jury that "all articles, which it is usual for persons traveling to carry with them, whether

from necessity, convenience or amusement, fall within the term *baggage.*" And, "that if it appears by the evidence, that the contents of the valise, or any portion of the same, were of a great or extraordinary value, for a person of plaintiff's business and station in life, without notice of the same being given to defendant, he cannot be held liable for their loss." And the court further charged that it is for the jury to decide what articles in the valise came within the definition of baggage, and this last was given at the request of the defendant's counsel. The Supreme Court of Pennsylvania in McGill vs. Rowland, 3 Barr, 451, say that "it is not obvious in what manner the court can restrict the quantity or value of the articles that may be deemed proper or useful for the purposes of traveling, because in the nature of things it is susceptible of no precise or definite rule; and when there is an attempt to abuse the privilege, a court must rely on the intelligence and integrity of the jury to apply the proper corrective." (See Angell on the law of Carriers, sec. 115, *et seq.*)

This, after all, is the correct rule for the determination of this case. The jury must determine, as a question of fact, whether the articles contained in the plaintiff's valise were the necessary and convenient articles of baggage of the plaintiff as a traveller, according to his occupation and position in life, and was their value a reasonable value of such articles to be carried as baggage, for the loss of which a common carrier should be held liable under the circumstances of the case. Any apparent abuse by the jury, whereby gross injustice should be done, would of course be corrected by the court.

For the errors in the proceedings and trial herein mentioned, the judgment must be reversed, and a new trial granted. The defendant is entitled to judgment upon his demurrer to the second count in the declaration.

Judgment reversed, and a new trial granted.

H. L. RITCH & CO., ET AL., APPELLANTS, VS. BURTON BELLAMY, ADMINISTRATOR, ET AL., APPELLEES.

a. In the absence of special equities, the County and Circuit Courts have concurrent jurisdiction in the matter of the settlement of administrations. Where there has been a suggestion of insolvency under the statute in the County Court, and creditors have filed their claims, the Circuit Court should not take jurisdiction at the suit of such creditors, in the absence of circumstances calling for the exercise of its chancery powers, as distinct from probate or surrogate powers, or unless for some special reason it is made to appear that the County Court cannot administer adequate and complete relief between the parties. The constitutional grant of surrogate and probate jurisdiction to the County Court considered and defined.

b. Where the jurisdiction a Court of Equity attaches to such matter for one purpose, it may retain the case for all purposes and make final settlement of the estate.

Appeal from the Circuit Court, Second Judicial Circuit, for Jefferson County.

A statement of the case is contained in the opinion of the court.

S. Pasco for Appellants.

The plaintiffs submit the following grounds and reasons why the demurrer appealed from should have been overruled:

1. To sustain the demurrer, it is incumbent on the administrator to show that the county court, sitting as of probate, has jurisdiction to hear and determine the matters of complaint set up by the plaintiffs. Thomp. Dig., 57, 58, 195, 203, 207; Constitution of 1868, Art. VI, s. 11; Bush's Dig., 416-17, sec. 17.

It would be a denial of justice to send the plaintiffs to a tribunal that can give no relief. The probate court cannot open a stated account, nor order the foreclosure of a mort-

gage, nor try an issue as to the insolvency of an estate, ... nc compel the administrator to make good any loss in c...ns quence of acts amounting to a *devastavit*. Its jurisdi...tio is limited and restricted by express statutes. In the m...atte of insolvent estates, its powers are strictly defined, an... the act under which the administrator is proceeding, accor...ding to its title, is only "to provide for the payment pro ra...a of the debts of insolvent estates." Act approved Jan. 8, ... 853, chap. 527, p. 105.

2. Chancery gives aid to the jurisdiction of inferior courts. 1 Sto. Eq., s. 33, 598-99; 1 Fonbl. Eq., b. 1, c. 1, s. 3., p. 9; Francis' Maxims, 31.

If the county court, sitting as of probate, finds itself unable to give full relief, the parties in interest can properly resort to this tribunal, and if the aid of this court becomes necessary for any reason, the jurisdiction of the probate court is not necessarily ousted. It can still dispose of the assets in its keeping, and if the chancery court recovers or brings to light new assets, such order can be made for the disposition of the same as is just and right. 22 Vt., 58-9; 9 R. I., 275; 64 N. C., 176, 180.

3. The purposes of the two causes or actions are different. The administrator is in the probate office, with his suggestion of insolvency, to pay the debts pro rata; the creditors are in the court of chancery to foreclose their mortgages, to surcharge and falsify or to open and revise the administrator's accounts, to effect the sale of the lands, to establish a balance as due the estate by the administrator for further action, and to establish the solvency of the estate upon a proper settlement of the administrator's accounts. But on matter is common to both the application to the court t take the assets into his own jurisdiction and make distrib tion.

4. The demurrer, if bad in part, is bad altogether. (Vc hies' Code, 206, a.) The demurrer is to the whole c plaint, and if any part of the matters complained of is v

n the jurisdiction of this court, after the suggestion of in-olvency, the action must be sustained. There surely can e no question about the right of foreclosure, and two of the arties plaintiff invoke the aid of the court for that pur-ose. 11 Fla., 123.

The statute does not recognize the rights of mortgagees, ut this court has held that it has not extinguished those ights. If the mortgagees are properly here, all the other arties are, for all have an interest in the subject matter, nd no more convenient way can be found to bring all the arties before the court than by filing a complaint in the ature of a creditor's bill.

5. It would be an encouragement to fraud if an adminis-rator could shelter himself behind a suggestion of insolven-y, whenever an action against him was imminent in conse-uence of acts of *devastavit* or maladministration.

In the present case, it is charged (and admitted by the emurrer) that the alleged insolvency has been caused by ıe improper acts of the administrator, and he simply pleads ıe insolvency as a reason why he should not answer the harges against him. Surely this is claiming advantage of is own wrong.

6. The remedy here sought is full, complete and ample, nd the court should take jurisdiction of the whole matter) save multiplicity of suits and settle the rights and equities f all the parties. The doctrine as laid down by Story in ɛgard to the concurrent jurisdiction of the courts of chan-ɛry and the spiritual courts in like cases, would seem to ɔnclude the matter. The spiritual court, he says, in the ınguage of Lord Chancellor Nottingham, has but a lame ırisdiction. "And although, ordinarily, in cases of con-ırrent jurisdiction, the decree of the court first having pos-ɛssion of the case is held conclusive, yet courts of chancery ave not held themselves bound by decrees of the spiritual ɔurts in cases of distribution, from their supposed inability) do entire justice." 1 Sto. Eq., secs. 546-7, 534, 542; 2

Ca. in Chy., 85, 95; 2 Rep. in Chy., 367, (156;) 3 ib., 72, (150;) 1 Vernon, 403, 435; Ib., 26, (279;) 2 Fonbl. Eq., 317; 2 Williams on Ex's, 1718; 2 Vernon, 47, (194;) Toller on Ex's, 489, and cases there cited; 2 Wm's on Ex's, 1727.

This court has expressed similar views in a recent case, and it is freely admitted that those views were followed as a precedent in preparing the complaint in this action. 13 Fla., 321.

Scott & Clarke for Appellees.

Where courts have concurrent jurisdiction, the jurisdiction of the court which first actually attaches to the matters in controversy becomes exclusive over those matters, and no other court of concurrent jurisdiction can interfere to oust that court of such jurisdiction. 9 Wheat., 532; Brightly, p. 504, sec. 43. "In all cases of concurrent jurisdiction, the court which first has possession of the subject must determine it conclusively." 20 H., 583; 1 Curt., 178; 1 Pa., 621; 6 McL., 355; 4 Am. L. R., 526; 5 ib., 659; Hemp., 708; 3 West L. M., 290; 5 Cond. Rep., 662; 2 Kelly, (Ga.) 304; 3 Yerg. R., 167; 2 Munf. R., 35.

If plaintiffs are dissatisfied with any of the decrees or rulings of the county court, they have their right of appeal to the Circuit Court for the correction of any errors. See Acts 1868, p. 15, sec. 19; Acts 1852, p. 105, sec. 1.

If the facts exist as charged in the bill, the administrator may be removed by the county court on application of any creditor, and be forced to render a true, perfect and final account of his administration and to pay over any and all amounts due from him to the estate, and the powers of the county court to compel him to so account are made much more ample and complete than those of a court of chancery. See Acts 1870, pamph., p. 19 to 22.

The Circuit Court refused to take jurisdiction. This court will not compel it to take jurisdiction if the parties have a

complete remedy in the county court, where the matter of insolvency is pending. 64 N. C., 176 to 179.

WESTCOTT, J., delivered the opinion of the Court.

This action is brought in the Circuit Court by mortgage creditors of the deceased intestate against his administrator, heirs-at-law and distributees. It is instituted in behalf of themselves and all other creditors who may come in and contribute. It is a general creditor's bill, accomplished by a charge of waste of assets, and negligent management by the administrator. The complaint describes the mortgages of the several creditors; alleges that before the institution of the suit a written suggestion of insolvency of the estate was filed in the county court of Jefferson county; that an order was made by said court requiring presentation to be made of all claims to the judge of said court, and that the claims of the creditors instituting this action have been proved and filed in the county court. It alleges waste and neglect upon the part of the administrator in the management of the assets, and affirms that upon a fair and just accounting, making all proper charges against the administrator, it will be found that the estate is solvent.

Plaintiffs pray for an account; that the administration and settlement of the estate may be transferred to the Circuit Court; that the administrator may be charged for his alleged waste and mismanagement; that the several mortgaged premises may be sold and the proceeds applied to the mortgage debts, and for the application of the assets to the payment of the debts, and for a general settlement of the estate. To the complaint the defendant interposed a demurrer upon the ground that "the matters therein complained of are now being examined into by a court of concurrent jurisdiction with the Circuit Court, to wit: the county court of Jefferson county, acting in its capacity as a court of probate." The demurrer was sustained and the bill dismissed. From this order this appeal is prosecuted.

Upon an examination of the constitutional grant of jurisdiction to the county court in the matter of the settlement of estates, it will be found that its authority is confined to surrogate or probate powers, and that it is expressly provided that in no case shall it have jurisdiction where the jurisdiction will conflict with that of the several courts of record. The circuit court having been previously invested with full original chancery jurisdiction, it is clear that the county court cannot exercise any chancery power, unless the power is of such nature that it may be called as well a probate or surrogate power as a chancery power. Wherever, therefore, a surrogate or probate power is at the same time a chancery power, there is unquestionably concurrent jurisdiction in the two courts, and wherever it is a purely chancery power, as contradistinguished from a surrogate or probate power, then the jurisdiction becomes exclusive. When we recollect that the settlement of estates is the fruitful source of accident, mistake, trust and fraud, and that the jurisdiction of the county court in this matter is for the most part limited to powers granted by statute, it must be clear as a general proposition that a court of equity cannot be limited in its jurisdiction, or prevented from its exercise in such matters, simply because an administrator has qualified and is in process of settlement of the estate in the county court. An account having been presented to an administrator and filed in the county court by a creditor, it certainly could not be insisted that such creditor could not bring a creditor's bill for that reason, nor could it be insisted that this creditor, in case the debt was disputed, could not bring his action at law against the administrator. It must be conceded, however, that in the absence of special equities, the county and circuit courts have concurrent jurisdiction in the matter of the settlement of administrations, and that in such cases the tribunal which first takes cognizance of the matter in controversy will retain it to the exclusion of the other, unless for some special reason it is made to appear that the

probate courrt cannot administer adequate and complete relief between the parties. 17 Ala., 794; 9 ib., 479; 13 ib., 144; 2 Stock. Chy., 287; 1 Green C. R., 239; 4 John. Ch., 410; 33 Ala., 241; Story's Eq., secs. 532, 541-2.

In this complaintcreditors seek to surcharge and falsifythe accounts of the administrator. They charge him with delinquences and seek to recover for alleged waste and conversion of assets. These are unquestionably the proper subjects-matter of equity jurisdiction. 8 Port., 400; 2 Wms. Ex'trs, 1104; 4 Cond. Eng. Ch., 94; 9 Port., 704; 15 Ala., 269; 3 Fla., 55.

Several of these creditors hold mortgages upon the real estate of the deceased intestate, and it must be apparent that a court of equity is the proper tribunal to decree a strict foreclosure and sale. We are not prepared to say that if a sale of this property was directed by the county court, and the proceeds applied to the respective liens, that such proceeding would be *coram non judice*. On the contrary, after careful examination of the authorities, we incline to the opinion that such proceeding would be sustained, as it pertains to the settlement of the estate and is in one sense but the simple payment of a debt. At the same time, it cannot be denied that the foreclosure of a mortgage is a matter which does not belong to the jurisdiction of the county court. It is very difficult to define accurately the point from which the court of equity has exclusive jurisdiction.

Again, it is a reasonable inference from the allegations of the bill, that the defenses of the administrator to the charge of improper management and waste of assets are of an equitable character.

Under all the circumstances, it seems clear that there are special reasons in this case why a court of chancery should take jurisdiction, and that the powers of the county court are not adequate or sufficiently comprehensive and flexible to render complete justice. 17 Ala., 795-6; 31 ib., 213;

4 John. Chy., 410; Story's Eq., sec. 543; 8 Port., 396; 13 Ala., 140; 2 Stock. Ch'y, 287; 1 Green C. R., 239.

These features of the case give the court of chancery jurisdiction, and having jurisdiction for one purpose, this will draw to it the right to adjust the entire administration. 31 Ala., 213. The remarks of Mr. Justice Ormond, in Blakely, adm'r et al. vs. the heirs of Blakely, we think cover this case entirely. Speaking for the court he says: "Conceding that the jurisdiction of chancery is concurrent in testamentary matters with the orphan's court, and that the court which first obtains jurisdiction will be entitled to keep it, there are many cases in which the court of chancery may take jurisdiction after the proceedings have been commenced in the orphan's court, and having obtained jurisdiction for one purpose, retain it for all purposes and make final settlement." 9 Ala., 394.

What should be the precise form of the decree or order here is a question which can best be determined after answer. We only decide that there are circumstances demanding the action of a court of equity, and that the demurrer should have been overruled. The judgment dismissing the bill and sustaining the demurrer is reversed, and the case is remanded for further proceedings.

EMELINE COY, ADMINISTATRIX, &C., APPELLANT, VS. MARK W. DOWNIE, ET AL., RESPONDENTS.

1. When, upon the whole case, it appears that a decree is prejudicial to the interests of both parties, this court may reverse it upon grounds other than those upon which a reversal is claimed.

2. An order for the sale of the interests of infants in real estate is inoperative, and the deed thereunder is void, unless the provisions of the

law have been complied with, so as to give the court or judge jurisdiction of the proceedings under which the order is made.

Where a mortgage for purchase money is sought to be foreclosed, and the deed of the premises contained covenants, the mortgagor may resist the foreclosure by a recoupment or offset of damages for a breach of the covenants, to the extent of the damages sustained, for a failure or partial failure of title, or any other matter embraced in the covenants.

Where a mortgage was executed and delivered to a third person, to be held by him until certain essential conditions were complied with by the complainant, for whose benefit the mortgage was executed, a decree of foreclosure should not be made until the conditions are complied with.

Where there is an express covenant in a lease to pay rent, the loss by the lessee of the use of the premises by means of the casualties of war will not excuse the payment of the rent, unless such casualties be expressly provided against in the lease.

Appeal from the Circuit Court, Fourth Judicial Circuit, assau County.

This is a suit brought in May, 1873, by Emeline Coy, lministratrix of the estate of Amaziah Coy, deceased, for e foreclosure of a mortgage.

On February 21, 1866, Emeline Coy, administratrix, aroline Dupray and Amelia Creighten, (with W. H. Du-ay, husband of Caroline,) sold and conveyed by deed of arranty of title in fee simple, with usual covenants of isin, &c., with a covenant to execute such further con-eyance as might be required, to John M. Payne, lots 8, 9,), 11, 12, 13, 14, 15, 16, 17 and 18, in block 15, in Fer-ndina, county of Nassau, for the consideration of $10,000. f this sum, $5,510, was paid down, and for the balance)hn M. Payne gave his note, payable in two years, with ght per cent. interest, secured by mortgage upon said ts.

The bill alleges the non-payment of the note and inter-t, and that John M. Payne has conveyed the lots to Celia . and Susan L. Payne and Mrs. Downie; that A. H. Cole is a claim or interest in lots 8 and 9 for the original pur-

chase money, and that E. N. Dickerson has a claim or interest in lots 15 to 18 for purchase money. The bill prays that defendants Payne and his grantees pay the note, or that the property be sold to pay plaintiff's claim, and all other demands upon the property; that the priority of claims be ascertained, and other relief.

John M. Payne and his grantees answer, setting out the sale and conveyance of the lots and the covenants of seisin, warranty, &c., and say that as to lots 15, 16, 17 and 18, the plaintiffs had no title, but only an assignment of a lease thereof for ninety-nine years from the trustees of the Florida rail-road company, dated 7th November, 1856, subject to an annual rent, and with the privilege of purchasing at $200 each, and that they had become forfeited by failure to pay the rent at the time of the conveyance and mortgage; and that lots 8 and 9 were not the property of Amaziah Coy or his heirs, but were the property of A. H. Cole. That by the failure of title to these six lots, the remaining lots and property (a hotel and appurtenances,) were greatly reduced in value, and they have suffered great damage thereby; that the lots had been sold for the U. S. direct taxes, and at the time of conveyance and mortgage were in the possession of the tax purchasers, and defendant Payne lost the use of the premises some six months before he could obtain possession, to his damage $3,000; that the consideration of the note had wholly failed; that the said damages should be set off against the note; that A. H. Cole was the owner of lots 8 and 9, of which fact Payne was ignorant until many months after the purchase by him, and Cole is still the owner; that Dickerson, the assignee of the Florida R. R. Co., owns the lots 15 to 18, and since the forfeiture has leased them to Downie and Riddell for a term of years.

A. H. Cole answers that he is the owner of lots 8 and 9, and had agreed to sell the same to plaintiff for $1,000 and had executed a deed, which was deposited with J. P. San-

derson, to be delivered on payment of that sum, and is willing to deliver the deed on payment of that sum, interest and his costs.

Edward N. Dickerson answers that lots 15 to 18 were leased with other lots to F. L. Dancy for 99 years, at an annual rent, that a large sum remained unpaid, that the taxes remaining unpaid the lots had been sold for taxes, and defendant had redeemed the same, and had taken possession of the lots as forfeited under the terms of the lease. He asks for judgment for the rent unpaid, and for taxes paid by him, &c.

The plaintiff filed a special replication to the answer of Payne, in which she alleges that she, with Caroline Dupray and Amelia Creighton, as heirs-at-law of Amaziah Coy, conveyed to J. M. Payne all their title and interest in the lots and property, and that before the deed was delivered, it was understood that lots 15 to 18 were leased lots and an indorsement to that effect was made upon the deed, and Payne agreed to pay the rent and comply with terms of the lease. That it was understood also that plaintiff was guardian of Henry, Emeline, John, Caroline and James Mattair, who were infant children of a daughter of Amaziah Coy, and heirs in her rights in the property, and that plaintiff, as guardian, should apply to the Circuit Court of Nassau county, and obtain leave to sell and convey their interest; that the note and mortgage and suit were executed to and in the name of Joseph Finegan, to be held by him until a deed could be obtained of the interest of the minor heirs of Amaziah Coy, all which was agreed to by all the parties. That the order for a deed of the interest of the minor heirs was obtained March 6, 1867, and December 2, 1867, plaintiff as guardian executed the conveyance to John M. Payne, a copy of which order and deed are annexed as exhibits. That upon the execution and delivery of this deed, the mortgage was assigned to her by Finegan, whereupon Payne agreed to pay the note at maturity.

That the leased lots have not been forfeited by any act of
hers to pay rent or taxes. That defendants are still in pos-
session under the deed; that lots 8 and 9 were at the time
of the sale to Payne the property of the grantors by virtue
of possession under the statute of limitations; denies the
alleged depreciation in value, and denies that Payne was
delayed in obtaining possession, or suffered damages; de-
nies the failure of the consideration.

The exhibits attached to this reply are the deed of plaintiff
to John M. Payne.

2. The lease for ninety-nine years, dated November 7,
1856, to F. L. Dancy, for eight lots, including lots 15 to 18,
at the rent of $128 per annum in advance, with option of
taking a deed on payment of all rents, and $1,600 for the
eight lots, right of re-entry in case of non-payment of rent,
&c., assigned to Joseph Finegan December 24, 1859, as to
lots 15, 16, 17 and 18, and by Finegan assigned to Ama-
ziah Coy.

3. An order of Judge Long, dated March 6, 1867, ap-
proving and confirming a sale of the interest of the minor
heirs, entered of record in Fall Term, 1867, in Nassau
county.

4. A guardian's deed, dated December 2, 1867.

5. Assignment of mortgage by Finegan to plaintiff.

The plaintiff replies to the answer of A. H. Cole, alleg-
ing and claiming title by occupancy and enclosure of lots 8
and 9 since 1861, whereby she claims title. Admits also
that the purchase money has not been paid to Cole, to-wit,
$200 for each lot, and interest thereon at six per cent.,
making $712, and denies that she agreed to Cole $1,000
for the lots.

Testimony was taken before referee, which was reported
to the court, upon which the court made a decree.
findings and decree are as follows:

That the title to lots 8 and 9 is in A. H. Cole, and
grantors at the date of their deed.

2. That the title to lots 15, 16, 17 and 18 was not in the grantors at the date of their deed, but that they had a leasehold interest for 99 years only, and that it does not appear that such interest was worth more than the rent reserved.

3. That the title to lots 10, 11, 12, 13 and 14 was in the grantors.

4. That the mortgage covers the grantor's interest in lots 10 to 14 and the leasehold interest in lots 15 to 18.

5. That the damages sustained by defendant Payne by reason of the failure of the title in lots 8, 9, 10, 15, 16, 17 and 18, at the time of the sale, was $2,400.

6. That Payne sustained damages to the amount of$1,050 in consequence of not being able to obtain possession of the premises.

7. That there was justly and lawfully due the plaintiff from John M. Payne, upon the note mentioned in the complaint, the sum of $1,040, with interest from the date of note.

8. The court decrees that the lots numbered 10 to 18 be sold to pay the same.

9. That the sheriff pay out of the proceeds, after paying the expenses of the sale, the rent due on the lease to the date of plaintiff's deed to Payne, excepting the rent for such times as the property could not be used and enjoyed by Coy and his heirs by reason of the presence of troops of the enemies of the United States.

10. That the sheriff pay the costs of this suit out of the proceeds of sale.

11. That the sheriff pay the amount found due on the note and mortgage, viz: $1,040, to the plaintiff, less the several sums above ordered to be paid for costs and ground rents.

12. That the sheriff pay out of the proceeds to the lessors of the leased lots the ground rent from the date of the deed

to Payne up to the day of sale, and the balance of the proceeds, if any, to the grantors of John M. Payne.

13. If the proceeds of sale be insufficient to pay the sums specified and ordered to be paid, the sheriff shall specify the the amount in his report and that John M. Payne pay the same to the party declared entitled thereto.

Friend & Hammond and *A. A. Knight* for Appellant.

Under date of February 21, 1866, Emeline Coy, Caroline Dupray and Amelia Creighton, as heirs of Amaziah Coy, Sr., deceased, sold to John M. Payne lots 8, 9, 10, 11, 12, 13, 14, 15, 16, 17 and 18, in block 15, in the city of Fernandina, for ten thousand dollars, executing and delivering a usual warranty deed for the property.

The negotiations of this sale, the delivery of the papers and the receiving of the purchase money were made by Joseph Finegan, who had an interest in the property by way of a mortgage from Amaziah Coy. As such Finegan acted under a verbal special authority to negotiate the sale. This special authority to negotiate a sale does not extend to contract.

Payne paid $5,510 down at the delivery of the deed on the 21st of February, 1866, and gave his note of $4,490 for the balance, payable in two years, and secured the payment thereof by the mortgage in controversy. This note and mortgage was made to Joseph Finegan, instead of to the grantors of said deed, but was assigned to the plaintiff before due.

Under the covenant of the deed to make such other and further deeds as may be found to be necessary, the plaintiff, as guardian of the minor heirs, (the Mattair children,) obtained an order of the Circuit Court to approve of the sale of the Coy property to Payne in behalf of said minor children and made a guardian deed of said property to Payne.

The delivery of this deed by the guardian to Joseph Finegan, and the recording thereof is a good delivery. 4 Kent's

Com., 454. On the execution and delivery of the deed to Payne on the 21st February, 1866, the following additional papers were delivered to John M. Payne, viz: the original lease from Trustees of the Florida Railroad Company to Francis L. Dancy for lots 15, 16, 17 and 18, duly assigned to A. Coy, Sr., and Payne had it recorded while in his possession. At the same time the original deed from the Trustees of the Florida Railroad Company for lots 10, 11, 12, 13 and 14 to Amaziah Coy, in fee simple, was also delivered to Payne and at the same time the redemption certificates for lots 8 to 18 inclusive were also delivered to Payne; all of which clearly showed to John M. Payne what kind of title he had received, viz:

1. A fee simple title for lots 8, 9, 10, 11, 12, 13 and 14.

2. A possessory title, or 99 years leasehold, with a covenant to purchase the fee, of lots 15, 16, 17 and 18.

3. The redemption of all and singular the premises from the forfeiture and sale of the property by the United States.

John M. Payne paid part of the purchase money and refuses to pay the balance of $4,490. Suit was brought to recover this amount, and this suit is against several defendants, viz: Against John M. Payne as the mortgagor, and Mark W. Downie and wife, Celia B. and Susan L. Payne as the present owners and holders of the property under John M. Payne.

A. H. Cole claims an interest in lots 8 and 9 for amount due him for original purchase money, viz: $1,000.

Edward N. Dickerson claims lease lots 15, 16, 17 and 18 as assignee of the Trustees of the Florida Railroad Company and the rent under the lease, and against Samuel T. Riddell as tenant. Mr. Riddell does not answer; his rights are therefore admitted to be subservient to the plaintiff's mortgage.

The testimony showeth no *duress*—no imposition or destruction of Payne's free agency—no *fraud*, whether by misrepresentation, concealment or trick, employed by the

plaintiff towards Payne to lead him into error or to mak[illegible] an agreement contrary to his interest—no *cheat,* no m[illegible] licious contrivance nor false suggestion, not even to impa[illegible] the true value or price of the property; not even a har[illegible] contract.

The testimony of Mr. Kœrner, the land agent in Fernan[illegible] dina, who has charge of the lease lots and sells propert[illegible] shows:

The value of lots 8 and 9, without improvements,	$1,0[illegible]00
Lots 10, 11, 12, 13 and 14, with improvements,	9,0[illegible]00
Lots 15, 16, 17 and 18,	2,4[illegible]00
In all,	$12,4[illegible]00

In 1866, these premises were valued about the same. Lots then were worth less, but the improvements worth more. Samuel T. Riddell finds the value about the same. As to fraud, see 1 Sto. Eq., secs. 208, 221, 222, 244, 245 and 246.

The agreement between Joseph Finegan and John M. Payne, entered into at Jacksonville under date of January 25, 1866, is not an agreement between the grantors and Payne. It does not stipulate any particular property, except the Coy hotel; and all the relation it has to the case at bar is that nothing else was expected than the interest of Mrs. Coy and her children.

Finegan had no authorized agency, and certainly there is no evidence as to prior authority given on subsequent assent or approval by the grantors. See 2 Kent's Com., 614 or 815, new ed.

Even if there would have been some binding force in the original memorandum, as a contract, it became waived, annulled, dissolved and given up by the new contract made and consummated on the 21st February, 1866. See Chitty on Con., 115.

Under the new contract, not only the Coy hotel propert[illegible] standing on lots 10, 11, 12, 13 and 14, but lots 8 and joining the hotel property south, and lease lots 15, 16,

id 18, joining east, were added; the redemption, further id more time was given; in short, a new solemn contract as made by deeds and covenants.

The mortgagor, John M. Payne and his vendees, sisters, ider him therefore are estopped from denying their *seisin* the property on this foreclosure suit. 6 How., 284; ump. 502; 7 How., 133; 2 Black 500 and 508; 3 Wash. 1 Real Prop., 219, 99; Brightly's Fed. Dig., 360, n. 70, 57, n. 10, 290, n. 250, 251, 742, n. 2, 746, n. 111.

As to lots 15, 16, 17 and 18, they were conveyed to Payne 99 years leasehold, with a covenant to purchase the fee mple title, and so expressed by the deed made and deliv-ed on the 21st day of February, 1866, by an endorsement 1 the deed. Payne received the property as such with his iowledge and consent as a part of the bargain. A deed ius made and delivered is a good deed and the endorsement a part thereof. 1 Starkie, 130; Jacob's Law Dic. Title eed; 3 ib., Title End.; Stewart vs. Preston, 1 Fla.; 1 ouv. Inst., n. 730; Bouv. Law Dic., 262; and parol evi-ence is admissible to show what the grantor's interest in iose lots were, 3 Wash. on Real Prop., 347; Bing. on Real rop., 409, 427; 9 Fla., 503.

As to lots 8 and 9, the pleadings admit the sale there of id right of property in Amaziah Coy, and by the testimo-y of Mr. Kœrner, Mrs. Coy redeemed them with the Hotel roperty, and Payne and his vendees, sisters, have held them nder the deed of Emeline Coy, et al., ever since February 1, 1866, undisturbed, and now hold them under our title; iey are therefore estopped from denying their title; query, as their title not become an absolute fee simple title by rescription? Livery of *seizin*, see Brown on Stat. of Fraud, cs. 465-486, 487-492; 2 Sto. Eq. Com., secs. 753, 754, 755, nd as per statute sec. 1, chap. 142, laws 1848, and secs. 5 nd 8, chap. 1,868, laws 1872.

And even if the vendors had not the title of these lots, nd no right of property therein, they would be entitled to

reasonable time, (and the Court would so order) to procure a deed to it. (12 Pet., 264; 7 How., 284; 5 Cr. C. C. 485; or see Brightly's Fed. Dig., Dec., page 742, notes 1 and 2, title sale.) A. H. Cole, however, is in court, admitting the sale of the property to the grantors of John M. Payne, (see sec. 753, 2 Story Eq. Com., n. 2,) and only seeks the protection of the court in the payment of the purchase money, $1000, which the plaintiff claims to be only $300 a lot, viz: $600 for the two, with interest at the rate of six per cent. since 1860, deducting therefrom the interest abated during the late war. Cole's interest therefore in said lots is $600, and ten year's interests $360—total $960.

If Payne or his sisters had paid this to Cole, they might claim it as a proper set off on the mortgage.

As to forfeiture of the lease lots 15, 16, 17 and 18, there could be no forfeiture without judicial proceedings and office found (see 9 Wall. 426,) besides courts of equity never enforce forfeiture, but relieve against it, (see 1 Story Eq. Com., sec. 891; 2 ib., sec. 775 and 1,315.) The true condition of these lots between the plaintiff and the defendants in this action is as follows: They are 99 years leasehold, created November 7, 1856, at an annual rent of $16 each, or $64 for the four lots, with a covenant to purchase the fee at pleasure at $200 a lot. The ground rent was paid to November, 1860, that is up to the time Coy got them. From November, 1860, to November, 1866, six years, the plaintiff has to pay the ground rent, amounting to $384, abating 4 years war time, $254, leaving a balance for the plaintiff to pay of $128. If Payne had paid this, he might have a just set-off on the mortgage; as he has not paid it, it goes to E. N. Dickerson.

Since 1866, John M. Payne and his vendees, sisters, must pay the ground rent, viz: 8 years, amounting to $512; besides this there appears to be due defendant, Dickerson, for taxes and redemption money, $49.75, making an amount to be decreed to E. N. Dickerson from Payne, of $561.65.

The defendant's counter claim, therefore,on account of deduction for the failure of title to six lots falls to the ground, and more so since the said defendants have been in the undisturbed enjoyment of said lots ever since 1866. The testimony of all the witnesses for the plaintiff and defendants shows that the defendants Payne have had the undisturbed possession and enjoyment of said premises.

As to the purported damage in obtaining possession, the evidence doe not warrant and the law does not allow such claims. A legal point is that the purported counter claim was not in existence at the time the note and mortgage was given. Besides by the redemption of the property the possession became and was legally vested in the redemptor. (See act of Congress, June 6, 1862, sec. 7, 12 stat., 422; do. 13 stat. page 502, sec. 7,) and when the property was conveyed to John M. Payne in February, 1866, he did not take immediate possession, but allowed the property to be occupied, not by the plaintiff and co-heirs of A. Coy, but by other parties who held them tortiously. This tortious possession is no eviction, either actual or constructive; no action therefore will lie or does exist upon the covenant in the title. 2 Black, 500 and 507.

Payne knew of the condition of the property and the occupancy thereof; he left it until about the first of April and obtained possession in May by legal process against the parties whom he left in possession at the time of the purchase. And in June, 1866, he obtained full and complete possession; and that Payne soon opened the hotel business after he got in possession appears from his own testimony. He received guests during the summer of 1866, and had his hotel in full operation on the first of January, 1867.

The claim for insurance is not well taken. He insured for his own benefit, and if he had burned out would have received the insurance money; and if it had enured to the plaintiff's benefit it was a matter of agreement.

In short, every item of counter claim interposed by the

defendants falls to the ground from want of evidence to sustain them. The plaintiff, therefore, is entitled to the relief prayed for in the complaint, viz: the recovery of the whole amount of the martgage note, to-wit: $4,490, with eight per cent. interest thereon from February 21, 1866, amounting to to date of decree, $2,875—total, $7,365.

From this amount the plaintiff has has to pay A. H. Cole, amount of purchase money for lots 8 and 9, $960, and E. N. Dickerson, ground rent, $128.

Besides this, E. N. Dickerson is entitled to recover from the defendants John M. Payne, or M. W. Downie and wife, and Celia B. and Susan L. Payne, the amount of ground rent due since 1866, viz: $512, and for taxes paid, $49.75; total, $561.75.

And the decree of the court ought to have been that the said John M. Payne or Mark W. Downie and wife, and Celia B. and Susan L. Payne pay the said several sums of money, with costs of these proceedings under the statutes, and that in default of payment the mortgage premises be sold to pay the same, and that if any balance remain unpaid that execution issue against the said John M. Payne, for the balance.

And that upon the sale of the property, all rights, title and interest of the defendants in said property with the equity of redemption be barred and forever foreclosed.

Cooper & Ledwith for Respondents.

The following points of law growing out of the state of facts set forth in the record and authorities are cited in support of defendants legal position:

Finegan was plaintiff's agent, even at the time of making the memorandum to sell the property to Payne for $8,000, and certainly afterwards in the transaction, and she is responsible for his acts, including his frauds, &c.; and the equities which those acts and frauds furnish the defendants

are good matters of defence to this action. *"Qui facit per alium, facit per se."* Thomp. Dig., 218.

But did it require a *written* power of attorney, or one under seal, to authorize him to negotiate the sale of real estate? See to the contrary 2 Kent, m. p. 614; Dunl. Paley's Agency, 159.

As to the power and authority of an agent to bind the principal, see Sto. on Agency, sec. 127 and notes, and sec. 443; Dunl. Paley's Agency, chap. 1, p. 1 and note, and pp. 5 and 8; 2 Kent, m. p. 613-14-15; 12 Fla., 340-41.

The principal cannot limit the authority of the agent by *private* instructions, so as to affect the rights of third parties dealing with said agent, whether the agency be general or special. Dunl. Paley's Agency, sec. 3, p. 8; 2 Kent, m. p. 621 and note.

Fraud and surprise vitiate contracts at law and in equity, and the party committing the fraud cannot take advantage of his wrong, on the principle that "he who seeks equity must do equity." 1 Sto. Eq., par. 64, e.

"Duress" will also vitiate contracts; not merely *physical* duress, but that which affects a contract obtained under unfair advantages and circumstances of hardship and grievance. 1 Bouv. Law Dic., tit. *Duress;* 5 Amer. Com. Law, p. 2, tit. *Duress,* citing Hardin's Ky. Rep., 605.

The second contract, to-wit: the one changing the consideration from $8,000 to $10,000, was obtained "under unfair advantages and circumstances of hardship and grievance."

The deed from plaintiff and other heirs of Coy, deceased, to John M. Payne conveys *all* of the lots in fee simple. A violation of a part is a volation of the whole contract, and the grantors cannot require performance on defendant's part until they complete their part of the contract. In other words, a contract is an entirety; bad in part, bad in whole. "The entire fulfillment of the promise by either is a con-

dition precedent to the fulfillment of any part of the promise by the other." 1 Bouv. Law Dic., tit. Contracts, p. 356.

If, therefore, *any* of the lots embraced in said deed were not in fee simple, the grantors cannot enforce their part of the contract until they are in a condition to convey fee simple titles to the grantee in each and every lot included in the contract, and tender to do so. It is admitted that A. H. Cole was and still is the owner of two of the lots, whatever may be the controversy in reference to the ninety-nine year lease-lots, in consequence of the Finegan memorandum in the corner at the bottom of said deed.

What is the effect of said memorandum? Parol testimony canot be introduced to vary or contradict a written instrument, and instruments under *seal* cannot be impeached or defeated by anything of less solemnity. 9 Fla., 490; Roberts on Fraud, 8, 9, 10, &c.; 1 Greenl. on Ev., 275, 276, 277, 300; Broome's Legal Maxims, 394, 595; 2 Kent, 556; 1 Bouv. Law Dic., tit. Defeasance, 445; 11 Mass., 30, 31, and particularly notes at bottom of pages.

The words of a grantor are taken strongest against him (if doubtful) and most favorable to the grantee. Broome's Legal Maxims, 440 and note; 2 Kent, 556-57.

The books make exceptions in cases where ambiguities, either latent or patent, appear on the face or in the body of the deed. No such appear on the face or in the body of said deed. It is remarkably clear of and free from ambiguities of any kind.

The guardian's deed is a fraud and a nullity. Delivery is one of the requirements of a deed. Delivery here is denied, and *stands denied,* and even knowledge of its existence. 1 Black. Com., 397.

To complete a delivery, *acceptance* must take place. 1 Bouv. Law Dict., tit. Delivery, 452; 4 Fla., 359. Hence the guardians' deed to extinguish title of minors and convey the same to Payne has never been legally executed or delivered.

There is nothing to show that the statutes of Florida, permitting guardians to convey real estate of minors, have been complied with. But the facts and circumstances of this case, in that connection, raised a strong presumption to the contrary. Among the irregularities is the want of advertisement prior to obtaining the order to sell. Thomp. Dig., 225; Act approved January 23, 1851, chap. 381, p. 29. The order or decree of court produced in evidence by the plaintiff is simply to confirm a sale *already made, and* was obtained a short time after the conveyance to Payne by the older heirs of Coy and long before the alleged execution of the deed by the guardian in behalf of the minors. Hence its reference must have been to *that* deed, and not to the subsequent alleged conveyance by the guardian. No recital appears in it that it had been made to appear to the court that proper advertisement had been made, &c. It is all totally irregular, and leaves the alleged grantee unsafe and unprotected as against the minors. 11 Fla., 71-2.

It purports to have been signed in the presence of J. P. Sanderson and T. T. Long, Judge, as witnesses, and acknowledged before T. T. Long, Judge of the Suwannee Circuit, for record. The testimony of Mrs. Coy, the plaintiff herself, is that they were all in Jacksonville, *Duval County,* that day, when all of the papers of that date were fixed up in the office of J. P. Sanderson, with Long and Finegan present. Long was not the Judge of the *Eastern Circuit,* and if acknowledged before him there, it was a fraud and a nullity and did not entitle the deed to record.

We are the only party that could be aggrieved by the judgment of the court, but we do not complain. The plaintiff has obtained all under the judgment she could possibly claim. We therefore respectfully ask the affirmance of the judgment, or, if reversed, it should only be to order the court below to dismiss plaintiff's complaint for want of equity.

RANDALL, C. J., delivered the opinion of the court.

If the decree in this case should be allowed to stand, it is evident that both parties must suffer, and it is for this reason, mainly, that we must reverse it upon grounds other than those urged by the appellant.

1. We agree with the Circuit Court that the title to lots eight and nine was, the date of the deed to John M. Payne, and still remains, in A. H. Cole. The grantors had only a naked possession under some agreement to purchase which had not been complied with by them. There was no evidence in the case showing what amount is due him for purchase money.

2. The title to lots 15, 16, 17 and 18, was not in the grantors, but the lots were held under a lease for 99 years, upon which the rent appears to be unpaid from 1859 or 1860. The lease stands assigned to Amaziah Coy, now deceased, and the grantors, Mrs. Coy, administratrix, and her two daughters, conveyed in terms the fee, but in fact and in law only their interest in the leasehold, with a covenant to make the title to the grantee. The interest of the minor heirs was not conveyed.

3. The court found that the title to lots 10, 11, 12, 13 and 14, was in the grantors, but to this we cannot agree. The infant heirs were seized of an undivided interest in the right of their mother, who was a daughter of Amaziah Coy, deceased, and this interest seems to be one-third of the estate, subject to the right of dower of the plaintiff, Emeline Coy, the widow.

It is assumed by the appellant that the guardian's deed under the order of the Judge of Suwannee Circuit, dated March 6, 1867, carries the interest of the infants. Upon examination of that order it does not appear that proper proceedings were had to authorize the making of any order for the sale of their interest, nor does the order in its terms authorize a conveyance. So far as the record discloses the matter, the guar-

dian's deed is of no effect. The record should show that in the proceedings for the sale of the interest of infants in real property, the statutes were complied with.

4. The mortgage covers all the interest which the mortgagee had acquired in all the property.

5. The court found that the damages sustained by reason of the failure of the title to lots 8, 9, 15, 16, 17 and 18 was $2,400. We think the evidence is not sufficiently clear as to the value of those lots, in connection with the whole as a hotel property, and the rents in arrear upon the leased lots at the time of the conveyance to Payne, to warrant the finding of this precise amount. Further proof should be taken on this point.

6. The court found that Payne sustained damages, including expenses necessarily incurred, to the amount of $1,050 in consequence of his being unable to obtain possession of the property after his purchase. The proofs appear to sustain this finding, and it was proper to allow such damages for a breach of the covenants in the deed.

7. As to the finding of the court that there is $1,040 and interest due to the plaintiff, when we take into account that a proportion, (say one fourth,) of the property of the value of $10,000 belongs to the infant heirs, and that the mortgage was given upon the premise and hypothesis that the interest of the infant heirs was to be obtained and conveyed to the mortgagor, and this not appearing to have been accomplished so far as the record shows, there was absolutely nothing due upon the note and mortgage. The replication of the plaintiff to the answer of Payne, moreover, expressly states that the note and mortgage were executed to Joseph Finegan to be held by him until a deed could be obtained of the interest of the minor heirs of Amaziah Coy, and that this was agreed to by all parties and that they were assigned by Finegan to the plaintiff upon the making of the order by the judge of the Suwannee circuit, and the execution of the guardian's deed; but as it does not appear by the proofs con-

tained in the record that the guardian's deed conveyed the interest of the infants, the right to enforce the mortgage by a decree does not seem to have accrued.

The right of the defendant Payne and his grantees to resist the collection of a part or the whole of the purchase money of the premises, under the broken covenants in the deed, cannot be questioned, whatever appropriate offsets by way of recoupment or otherwise may exist in consequence of the failure of title to or possession of the whole or any part of the property, and under the express covenants of seisin of title in fee simple, of possession and quiet enjoyment, and against defects and incumbrances, they may be set up against and in bar of a suit to recover the purchase money, or they may be recovered by direct action upon the covenants.

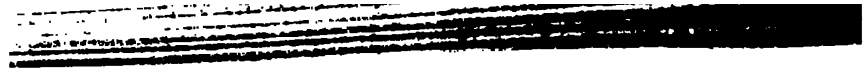
The grantors are liable for any breach of their covenants, and as this mortgage was given to secure them, the recoupment or offsets may be made against the claim of the present plaintiff, who was one of them and who represents them in this suit.

8. The decree directs the sheriff to pay out of the proceeds of the sale the rent due on the lease, excepting the rent which may have accrued during the time the property could not be enjoyed by Coy and his heirs by reason of the military disturbance. This is not correct. There does not appear to be any reservation in the lease as to any interruption of the occupancy by reason of the disturbance, and it has been held by this court (in Robinson vs. L'Engle, 13 Fla.,) that where there is an express covenant to pay rent, the loss of the use of the premises on account of the casualties of war, is no lawful excuse for the non-payment of rent. And moreover, there was no proper issue before the court upon which to decide that question between the lessor and the lessee of these premises, nor in any event could the sheriff properly determine the amount to be paid out of the proceeds. If the proceeds are to be distributed among adverse claimants, they should be

paid into court and distributed under its order after a full hearing.

9. It does not appear to this court that the defendants, Edward N. Dickerson and A. H. Cole, are necessary or proper parties to this action. Their rights appear to be antagonistic as well as superior to those of the plaintiffs and the other defendants.

The decree of the Circuit Court in this cause is reversed, and the cause remanded with directions that such further proofs be taken by the parties as may be deemed necessary, and that the parties may amend their pleadings in such respect as may be deemed advisable, and that such other proceedings be had as may be according to law and the practice of the court. The clerk will transmit to the Circuit Court for Nassau county a copy of the opinion herein, together with the judgment of this court. It is further ordered that the appellant pay the disbursements in and about her appeal, but that the respondent recover no costs.



DECISIONS

OF THE

Supreme Court of Florida.

EXTRA AND SPECIAL TERM, JULY, 1874.

JOHN W. PRICE AND WIFE, ADMINISTRATOR, &C., ET AL., APPELLANTS, VS. HENRY HICKS, APPELLEE.

1. For the purpose of reviewing the statement of an account by a referee appointed under the Code of Procedure, who was directed to take and state an account of partnership transactions, and of the partnership property, the debts and credits of the copartnership, what real and personal property was purchased with partnership funds, and to take testimony and report the same in writing upon all the facts and issues in the case, it is not essential, upon an appeal from a decree entered in accordance with conclusions drawn by the referee in his report, for the purpose of review, that exceptions shall have been taken to the report in like manner as exceptions may be required to a report of a master in chancery, to whom matters are referred for adjudication.

1. F. a free white man, and H., a slave, in 1863 carried on business as partners, the slave's master being paid an agreed sum for his hire, and real and personal property were purchased with the profits of the partnership business; and after H. became free, the partnership business was renewed upon terms which recognized H.'s rights as a partner, while he was a slave; *Held*, that the rights of H. in the partnership business, and in real and personal property so acquired during servitude, must be recognized to the same extent as though he had been free.

3. Where land is purchased by partners with partnership funds for partnership use and convenience, and conveyed to them in such manner as to make them tenants in common, it will be treated and considered

in equity as vesting in them in their partnership capacity, and to be applied to partnership purposes, for the satisfaction of the partnership creditors and of the claims of the individual copartners as between themselves in the settlement of the copartnership affairs, as against dower and the claims of heirs-at-law..

4. Where land is purchased by partners with partnership funds, but *not* for the use and convenience of the partnership business, or in the legitimate line of their partnership business, they become invested with the title as tenants in common, and their respective interests therein are several.

5. Where two partners purchase real estate with joint funds, taking the title in the name of the wife of one of them, her title is subject to a resulting trust in favor of the individual partners and the rights of their creditors.

6. When one of two partners dies, the survivor is entitled to the possession and disposition of all the partnership property, and in a suit by him instituted for the purpose of closing up the affairs of the copartnership and to recover from the estate of the deceased partner any amount due him from the deceased, it will be improper to include in a decree in favor of the survivor any amount invested by the partners in real or personal property, unless such property had been disposed of by the deceased partner, or for his use, in his life-time. The fact that the title to land purchased by partners with partnership funds was taken in the name of the wife of one of the partners, since deceased, or that any of the property of the copartners has been disposed of by the widow, or that she has collected money due on partnership accounts, affords no ground for charging the estate of the deceased partner at the suit of the survivor. A surviving partner cannot charge the estate of the deceased partner for a share of the earnings of the copartnership which remain in open account against their customers, or which were not paid to or realized by the deceased in his life time.

Appeal from the Circuit Court, Second Judicial Circuit, for Leon County.

Hicks, complainant, commenced his suit in 1869, in equity, against John W. Price, administrator, and Elizabeth O. Price, administratrix of the estate of Henry B. Fitts, deceased, and against the infant children of the deceased, and alleged in his bill that in 1863 complainant was a slave of one Alston; that with the consent of his owner he formed a partnership with Henry B. Fitts in the business of blacksmithing at Tallahassee, which continued for about one year,

during which they earned large sums of money, Fitts keeping the accounts and collecting the moneys earned. From January, 1866, they again carried on the business as partners until Fitts' death in July. The hire of Hicks from his owner in 1863 was to be paid at $600 per year out of Hicks' share of the earnings. During the year 1863, there was purchased by the partners with the partnership funds, two town lots described as lots 15 and 16 in the north addition to Tallahassee, and that Fitts took the title thereto in the name of his wife, Elizabeth O. Fitts, "with the full understanding and agreement between the parties that the purchase should enure to the benefit of the copartners *equally*." That Fitts collected during the copartnership in 1866 the sum of $3,583, clear profits, no part of which he divided with complainant. That during the copartnership in 1863, two mules and one horse were purchased by the firm, of which one mule and the horse were sold by Fitts, who appropriated the money received to his own use, the other mule was sold by Mrs. Fitts since Mr. Fitt's death. A valuable wagon was made by the firm as their property, which remained in the hands of Mrs. Fitts.

During the existence of the partnership an execution in favor of one Lively against Fitts was levied upon the shop and lot belonging to Fitts, where they carried on their trade, and the execution was paid off with partnership funds, amounting to between three hundred and four hundred dollars. Complainant alleges that Elizabeth O. Fitts obtained letters of administration upon the estate of her husband; that she has since intermarried with John W. Price; that he has endeavored to obtain a settlement with them of the said partnership affairs but without avail.

Complainant prays that an account may be taken of all the earnings and assets of the copartnership, that so much as may be found due him may be decreed to be paid to him out of the estate or the copartnership property, and especially that the said lots 15 and 16, and the lot on which the blacksmith

business was carried on, may be decreed to be sold to satisfy complainant's claim.

The defendants demurred to the bill and the demurrer being overruled they severally answered. Mrs. Price answered that complainant was not a partner of her husband Fitts in 1863, but a hired servant; denies that there was any property purchased by the partnership, or any money earned; that the house and lots 15 and 16 were purchased by her with her separate property, and so also the horses and wagon and some land called the "Lasch" land. The answer of the infants was the general answer in common form.

An order of reference was made to a referee, (the Code of Procedure having been adopted after the commencement of the suit,) "to take and state an account of all partnership transactions set forth in the bill of complaint between complainant and Fitts in his life time, and of all the property of said copartnership and what became of the same, and of all debts and credits of said copartnership, and whether any and what property, real or personal, was bought by either of said copartners, and paid for out of the copartnership money or effects, and to take testimony and report the same in writing upon all the facts and issues set forth and made in the pleadings in the case."

The referee reported that he found the account books of the firm so badly kept that it was "impossible to obtain any correct idea of the status of the parties" as to the transactions of 1863, but was compelled to reply on the evidence; that he obtained from the books the following: "That the earnings of the partnership in 1866 amounted to the sum of.....$2,449.38
Expenses of shop..... 15.35

Net earnings.....$2,434.03
Complainant's share, one-half..... 1,217.01
Advanced to complainant..... 359.00

Balance due him.....$858.01"

From the testimony of the witnesses, he says he finds "that Henry B. Fitts was indebted at the time of his death as follows: House and lot costing in Confederate currency the sum of $3,000, worth in U. S. currency $600.

	Complainant's share....		$300.00
One horse value 100,	"	"	50.00
Two mules 200,	"	"	100.00
Set of gear, 10,	"	"	5.00
One wagon, 100,	"	"	50.00
Lasch land 600,	"	"	300.00
Improvements on house and lot and share of crops 200, one-half.....			100.00
			$905.00
Interest two years at six per cent.....			108.60
Interest six years at eight per cent.....			434.40
Balance due on earnings of 1866, as per book,....			858.01
Interest on same five years,.....			343.20
Due on fi. fa.....			162.02
Interest six years at six per cent.....			40.32
Interest six years at eight per cent.....			77.76

Am't due complainant 6th January, 1872...$2,929.31."

The referee further reports: "It being duly established from the testimony that the land, house and lot, horse and mules and wagon, were bought with the partnership property, though the titles were taken in the name of Mrs. Fitts, yet as they were not purchased with her funds, I would respectfully submit that the complainant has an equitable lien on said property. But inasmuch as one of the defendants, Mrs. E. O. Price, on the 2d day of August, A. D. 1869, alienated a portion of said property, *if* the same was deeded to an innocent purchaser for a valuable consideration and without notice, it is no longer subject to the claim of the complainant. The property not disposed of is still liable, and the administratrix of the estate of H. B. Fitts having

disposed of a portion of said property in her own wrong, [redacted] is responsible in her [redacted] and as administratrix. I therefore recommend a judgment in favor of complainant in the sum of $2,929.31."

Some twenty exceptions were taken to the report by defendant's counsel, only two of which, however, were sustained by the court, to wit: that the credit of $162.02, amount paid by Hicks, is improperly credited in said report to Hicks, and that the charges for interest are not sustained by any testimony showing the true accounts upon which interest is allowed or calculated. The report was recommitted to the referee with instructions to report whether the items of one horse, two mules, lot of gear, one wagon, Lasch land, improvements on house and lot and share of crops, were valued in U. S. or Confederate currency, and upon what testimony he ascertained said values, and that he restate the account, reducing Confederate to U. S. currency, and allow interest at the rate of six per cent. on accounts which accrued prior to the act of 1866 regulating the rate of interest, and at the rate of eight per cent. on amounts accruing since the passage of that act.

The referee subsequently reported as follows: House and lot costing in C. S. currency, $3,000, worth in U. S. currency ..... $1,000—Hick's share.... $500.00

One horse, U. S. cur'cy.	170	"	85.00
2 mules, "	240	"	120.00
1 wagon, . "	125	"	62.50
Lasch land, "	80	"	40.00
Corn, 600 bush. "	600	"	300.00
Fodder, 7200 lbs. "	72	"	36.00
Wagon gear, "	20	"	10.00
			$1,153.50
Interest 9 years 9 months at 6 per cent.....			676.27
Balance as per books 1866, (first report).....			85.01
Interest from 1st July, 1866, at 8 per cent.....			497.64
Total due Henry Hicks.....			$3,185.42

The testimony taken, except the books of account, is submitted with the report. The court therefore made a decree "that a copartnership existed between the complainant and H. B. Fitts, in his life time, as set forth in the bill of complaint; confirms so much of the original report of the referee as sets forth that the house and lot in the city of Tallahassee conveyed to Mrs. Eitts, was paid for with the funds of the copartnership; and confirms so much of the amended report as sets forth and finds that the sum of $3,185.42 was, on the date of the report, October 8, 1873, due the complainant from the defendant, Elizabeth O. Price, as administratrix, and John W. Price in right of his wife administrator of the estate of Henry B. Fitts, deceased," and thereupon the court entered judgment accordingly, and ordered and decreed that the said lots 15 and 16 having been purchased with copartnership funds, she held the title as the trustee for said copartnership, and that the same is subject to be sold to satisfy the said debt, and that R. A. Shine, one of the masters of the court, sell the same, &c.

The defendants excepted to the rulings and decree and appealed therefrom.

Papy & Raney for Appellants.

The decree or judgment of the court below should be reversed,

1. Because, if the testimony is to be taken most strongly in favor of the plaintiff in the court below, it creates at most only a resulting trust; and as the money which Hicks states was the consideration of the purchase was partnership funds, a trust in such cases would result in favor of the partners and each partner would be entitled to one-half interest in the property. It would then follow that Hicks would be entitled to one-half interest in the lot deeded to Mrs. Fitts, (now Mrs. Price,) and if so, all that the decree should have given him was one-half interest in the property. But instead of this, it makes Hicks a creditor of H. B. Fitts to

the extent of one-half the purchase money, and then decrees the whole property to be sold to pay Hicks his one-half interest in it. The effect of this is to give Hicks the benefit of the whole to make good his one-half. No resulting trust, of the nature of that which which may be considered as existing in this case,carries with it such a consequence. If it had been alleged and proved that Hicks' part of the purchase was in the nature of a loan, and that a *lien* on the property existed for his reimbursement, or that the investment was without Hicks' consent, then a decree to sell it to pay what was due him might be upheld. But there is no case like this alleged or proved. Then if there was a resulting trust, Hicks would be entitled to one-half only. But, besides, there is nothing to show that there was any balance due from one partner to the other on account of the alleged partnership in 1863 at the time the lots were purchased. Even upon the idea of a resulting trust, the deed alleged to have been taken by H. B. Fitts in the name of his wife is to be regarded as a conveyance by him to his wife of his half interest, which he could legally do, and the fact alleged or stated by Hicks himself that the property was bought that Mrs. Fitts might have a house, clearly shows that no fraud was contemplated by Fitts in taking the deed in the name of his wife. It is true that where a trustee invests trust funds and takes title to himself, the *cestui que trust* may either elect to take the property purchased or the money, and have a decree for the money instead of the property. But this is not so in regard to a resulting trust, of the kind in question. It must appear that the investment was wrongful, or without the consent of Hicks, to authorize a decree for the money and a sale of the property to pay it. 7 B. Mon., 433; 2 Wash. C. C. Rep., 442; 4 Eng., 518; 2 Sto. Eq., secs. 1254, 1257; 3 How., 485; Adam's Eq., 156, note; Perry on Trusts, sec. 144.

2. The decree is erroneous because, if based on the *idea* that Fitts became indebted to Hicks by virtue of the part-

nership which was entered into in 1866, this was a subsequent indebtedness and could not affect a deed which conveyed property to his wife in 1863. Hicks knew of the conveyance when the subsequent partnership was formed, and no promise by Fitts as an inducement to form the new partnership could result in divesting his wife of the title which she acquired under the deed made to her in 1863. Nor could any indebtedness from Fitts to Hicks growing out of the new partnership subject the property conveyed to Mrs. Fitts in 1863 and divest her of the right she had already acquired, whether the conveyance to her be considered as a voluntary conveyance or not. 2 J. C. R., 413; Adam's Eq., 157, note; 2 Beavan, 456; Perry on Trusts, 123, 147.

3. Hicks was an incompetent witness, and his testimony in regard to transactions and communications between himself and H. B. Fitts should be disregarded, because Hicks is a party to the action and Fitts was deceased at the time Hicks' testimony was taken. Sec. 331 of Florida Code.

4. The decree is erroneous because it embraces Hicks' alleged half of the purchase money of the Lasch land as a charge against Fitts. If the testimony is to be taken most strongly in favor of the plaintiff, it creates only a resulting trust as to this land, and there is no evidence that the same does not still stand in the name of Mrs. Fitts, or that it was in any manner disposed of; and such being the case, the reasoning used above as to the house and lots is applicable, and the court should have only decreed to the complainant a resulting trust to the extent of one-half of the land.

5. The decree is erroneous because, in confirming the report of the master, it fixes the value of the personal property at the time of taking the testimony as the measure of Hicks' right of recovery, whereas of he had any right of recovery growing out of the payment of the partnership funds, &c., the amount paid or its value and interest is the measure of recovery.

The present value of the mules is taken, whereas the tes-

timony of Hicks is that in 1863 they cost $252, the amount scaled at Confederate values. Assuming that Confederate money was worth from two to three to one in U. S. currency, would give them a value of but $126 at that time, and make Fitts chargeable with but $63 and interest at 6 per cent. for ten years, being about $100, whereas he is now charged with $120. Apply same test to value of wagon.

6. Fitts is charged with the wagon, when the testimony is that the wagon still exists, being on the Fitts' place, and that it is partnership property, having been bought with partnership funds for the partnership. Hicks, as surviving partner, is entitled to the possession of this wagon, and if Mrs. Fitts withholds it from him, he should bring his action against her individually for it for the benefit of the partnership. It should not be charged against Fitts in the partnership account, nor its value be sought to be recovered by a sale of other property.

The mules sold by Mrs. Fitts is a charge against her individually, and not against Fitts, or in the partnership account.

7. There is no proper or sufficient proof as to the quantity of fodder produced, but merely an estimate based on a relation of the fodder crop to the corn crop, without any testimony as to the character of the crops that year, or how much land was cultivated. The testimony as to the quantity of land worked is fifty or sixty acres, when in fact the place contained only forty acres.

8. We maintain, finally, that though the above positions are correct if there be a resulting trust, yet the testimony is not sufficient to make out a resulting trust in favor of Hicks. The testimony of the other witnesses besides himself is very uncertain and contradictory, not clear and positive. 1 J. J. Mars., 3; 1 Bibb, 609, 611; 30 Maine, 126.

R. B. Hilton for Appellee.

It will be noticed from an examination of the record that no exceptions were made or taken by the defendants to the order of the Chancellor of July 7th, 1873, by which their exceptions numbered respectively 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 14, 17, 18, 19, 20, to the original report of the referee, were overruled.

It will be further observed that no exceptions whatever were made or taken by the defendants to the referee's second, or supplemental or amended report. It is upon that report that the final decree of the Chancellor is based.

"When no exceptions are filed to the report of the master, no exceptions can be taken to it in the Supreme Court." 3 How., 691; 2 Grat., 116.

The copartnership contract entered into between Hicks and Fitts in January, 1863, though made when Hicks was a slave, yet having been entered into with the assent and concurrence of Alston, the master of Hicks, was not void. A slave may make a valid contract, by the assent of his master, with a third person; so held in the English Court of Common Pleas in 1802, in the case of Williams vs. Brown, 3 B. & P., cited in 1 Par. on Con., 410. And in note to page 148 of Hill on Trustees, it is said: "Notwithstanding the rule of the law that a slave cannot acquire property, a purchase of land may be made by one, in the name of a free person, with the assent of the master, in which case, though the right of present enjoyment might be prevented by the state of slavery, yet no one could interfere but the master, and if the slave subsequently becomes free, the resulting trust may be enforced." The case cited is Lieper vs. Hoffman, 26 Miss., 615, by reference to which in U. S. Digest for 1855, p. 509, it will be seen that the contest there was between the emancipated slave and a party who, with notice of the trust, had taken a deed of the property from the person in whom the title was vested for

the slaves's benefit. See also 38 Ga., 655; 43 Miss. 603; 63 N. C., 131, 356; 3 Heiskill, 654.

No doctrine is better established than that "where, upon a purchase of property, the conveyance of the legal estate is taken in the name of one, while the consideration is given or paid by another, a resulting trust arises, and the person named in the conveyance will be a trustee for the party from whom the consideration proceeds."

The bill charges and the evidence proves that during the existence of the copartnership, there was purchased by the copartners, with the earnings of the copartnership, and as the property of the copartners, "the real estate adjudged to be sold by the decree." A resulting trust has been held to arise when a purchase is made by a man in his own name, but with funds in his hands in a fiduciary capacity, as where a trustee buys with trust money or a partner with partnership funds. Hill on Trustees, 147, note.

Again: "If a partner applies the partnership funds or invests the same in his own name, and for his own use, the other partners have a right, if they can distinctly trace the investment and elect to do so, to follow the partnership funds in the new investment, and to treat it as trust property held by that partner for the benefit of the firm, and as liable to be accounted for by any person into whose possession the same may come, who is not a *bona fide* purchaser for a valuable consideration without notice. Collyer on Partnerships, sec. 182.

RANDALL, C. J., delivered the opinion of the Court.

It is objected on the part of the respondent that the court will not go behind the report of the referee in this case, because no proper exceptions were taken thereto. While it is true that as a general rule where no exceptions are taken to the report of a master, no exceptions will be allowed in the Supreme Court, the rule can hardly be made to apply here. This was a reference under the provisions of the Code,

not for the purposes of a *trial* by the referee, but for the *information* of the court, to take and state an account of the partnership transactions, and of the partnership property, and what has become of it, what were the debts and creditors of the copartnership, what real and personal property was purchased by either of the copartners with copartnership funds, and "to take testimony and report the same in writing upon all the facts and issues in the case." The referee presents the testimony taken before him, states an account therefrom and recommends judgment for the complainant for a certain sum as stated to be due.

There were two reports made by the referee. The defendants excepted to the first report, and it was recommitted for the purpose of making it more clear, but it does not seem that the second report avoids the effect of the exceptions. But are exceptions necessary? "Where a master by his report states all the facts correctly, but is mistaken as to the legal consequences of these facts, it is not necessary for the party dissatisfied with tthe master's finding to except to the report, as the question decided by the master may be opened upon further directions without exceptions." (Daniel's Ch. Pl. and Pr., 1,492.) The court entered judgment "confirming" the report of the referee and awarding the amount, as recommended, against the appellants, whereupon the appelants excepted to the rulings and judgment of the court. The only mode of reviewing the rulings of the referee or his report is by an appeal from the judgment entered thereon, whether the findings be on a question of law or fact. (Code, sec. 218;) and this is only where the issues are referred *for trial,* and it seems unnecessary to "confirm" a report of a referee appointed solely to take testimony and report upon matters for the information of the court, as in this case, for he was not called upon to exercise any judicial judgment as to the law or the facts.

Under the pleadings in this case, the first issue to be tried is whether there was a copartnership between the complain-

ant and Henry B. Fitts as to the several transactions occurring between them in the years 1863 and 1866. From the evidence it cannot be doubted that such partnership did exist in 1863, and again in 1866, and whatever question might have been raised as to the rights of the parties on account of the status of the complainant in 1863, yet the subsequent negotiations resulting in a renewal of the copartnership after he became free recognized his rights as though he was free in 1863, and he is entitled to the benefit of that recognition. It does not appear that there was a continuing copartnership from 1863 to 1866, because the complainant expressly states that he refused to continue it after 1863, and he gives no account of his own earnings, and demands none of the earnings of Fitts during the intervals. The testimony relates only to the joint operations in 1863 and in 1866.

What then are the rights of the parties growing out of the partnership and the voluntary investments of partnership funds in real estate, whether for the purposes of the joint business, or otherwise, as an investment of surplus capital outside of the regular business for which the copartnership existed?

During the year 1863, while Hicks and Fitts were conducting their business of blacksmithing, they purchased and paid for, out of their earnings, certain real estate, the title to which was taken in the name of the wife of Fitts, (one of the defendants,) "but with the full understanding and agreement between them that the purchase should enure to the benefit of the copartners equally." This is the statement in the bill. In his testimony complainant says he was not aware until some time after the purchase that the title was taken in the name of Mrs. Fitts, and had supposed the title had been taken in the name of both the partners, and on expressing dissatisfaction with the condition of the title, became satisfied upon being assured that the title should be "made out properly," or his share of the purchase money paid to him. The investment was made in the house and

lot in Tallahassee at the suggestion of Mrs. Fitts, who wanted "a house to live in."

In Goodwin vs. Richardson, (11Mass., 467,) the court holds that where two parties buy land with partnership funds, and there is nothing done in the way of agreement between them how it is to be held, it is not in the law considered as partnership property, that is, it is not subject to the law governing partnerships generally. So in New York, Cole vs. Coles, (15 Johns., 159,) which was an action of assumpsit by the administratrix of a deceased partner against the survivor, for money had and received upon a sale of real estate belonging to the partnership sold jointly in the partner's life time, the proceeds whereof were converted to the use of the defendant, the court says: "There may be special convenants and agreements entered into between partners relative to the use and enjoyment of real estate owned by them jointly, and the land would be considered as held subject to such convenants, but nothing of that kind appears in the present case; and in the absence of all such special covenants, the real estate owned by the parties must be considered and treated as such, without reference to the partnership." This is the rule of the English law. In equity, "whenever real estate has been purchased by the partners with partnership funds *for the use and convenience of the partnership*,and there is no express agreement that the property shall be the individual property of the partners,each standing as a debtor to the joint fund for the cost, it remains as part of the joint stock or fund." In Loubat vs. Nourse, 5 Fla., 351, Justice Thompson delivering the opinion of the court, says: "The facts of this case bring it within the equitable rule before laid down. The wharf lot was purchased, and the wharf erected thereon, out of the joint or partnership funds; it was held and owned as joint property, for the use and convenience of the partnership, the partnership alone having the reception of the rents and profits therefrom; and therefore the application of it to partnership

purposes, such as the satisfaction of creditors against the dower of the widows of the partners and the claims of the heirs at law, is clear beyond a doubt."

This court in Robertson vs. Baker, 11 Fla., 192, 225, says: "The *contract* or *agreement* of the parties, and even the *intention,* when clearly manifested, is recognized as the true and only test by which the character of partnership property is to be determined, and this, we think, will be found, upon a critical examination of the reported cases, to be the established doctrine of the English courts." * * "In Massachusetts, the doctrine of conversion is carried beyond that of the English courts, and it is there held that 'when real estate is purchased by partners with partnership funds, for partnership use and convenience, although it is conveyed to them in such manner as to make them tenants in common, yet in the absence of an express agreement, or of circumstances showing an intent that such estate shall be held for their separate use, it will be considered and treated in equity as vesting in them in their partnership capacity, clothed with an implied trust that they should hold it until the purposes for which it was so purchased shall be accomplished, and that it shall be applied, if necessary, to the payment of the partnership debts.'" The court in Robertson vs. Baker adopted the rule as just quoted from Dyer vs. Clark, 5 Metcalf, 562, as the better law, and it is therefore considered the law of this State.

These two cases refer exclusively to lands purchased and held for the use and convenience of the partnership in carrying on its business or trade. Where land has been bought by partners and paid for out of partnership funds, but not for the use and convenience of the copartnership business, or for the purposes of the copartnership, the English rule yet prevails, and the individual partners are tenants in common of the estate as real and not as personal; and this distinction is observed in the cases cited from 5th and 11th Florida Reports.

It seems to us from the present state of the pleadings and the evidence in this case, that the lots 15 and 16 in Tallahassee were purchased by Hicks and Fitts with their joint funds as an investment outside of any connection with the carrying on of the partnership business, and that their interests became several, as tenants in common of real estate, without reference to the existence of the copartnership.

In this light, the house and lots 15 and 16, having been conveyed to Mrs. Fitts for the purposes and with the intent and objects stated in the testimony, (if that be sufficient to overcome the sworn answer of Mrs. Price, which it is unnecessary now to determine,) the effect is that she holds the title as a trustee for the use of the complainant as to one moiety, and for the use of the estate of her late husband as to the other moiety, unless as to that the conveyance to herself may have invested her with a good title, except as to the existing creditors of the copartners or of her husband.

The decree in this case adjudges that the complainant recover against the defendants, Price and wife, as administrator and administratrix of the estate of Henry B. Fitts, deceased, the sum of three thousand one hundred and eighty-five dollars and forty-two cents, this sum being the aggregate of the items in the report of the referee, which includes the complainant's share of the purchase money of the Tallahassee lots and the "Lasch lands," a mule, wagon, and other personal property which were in the possession of one or both of the partners at the time of the death of Fitts, and which personal property belonged to the complainant as surviving partner.

Most assuredly as to these items, the cost or value of the real estate held by Mrs. Fitts as trustee, and of the personal property belonging to the survivor, there can be no claim in favor of the complainant against the estate of the deceased partner. If he is rightfully the beneficiary of the resulting

trust in the lands conveyed to Mrs. Fitts, whether individually or as surviving partner, he may have his remedy, but not as for an indebtedness against the estate of Fitts, for the property has not gone into that estate. The mule and the wagon, and such other of the personal property as belonged to the partnership at the death of Fitts, were not of his estate, and if they have been disposed of by a wrong doer, the remedy must be against some other than the representatives of the estate as such.

A large item of the indebtedness mentioned in the report of the referee is for interest on the money invested in the real and personal property. It cannot be that Fitts' estate is chargeable with interest upon money invested in the lands or other property in trust for the benefit of the complainant himself, and which property remained in the possession of the several partners at the time of the dissolution by the death of Fitts; for the investment was not made fraudulently, but voluntarily by Hicks himself, and the title in the lands so taken for his use in the name of any third person is his title, as effectually as though it were vested in his own name. Nor can the fact that the trustee was the wife of Fitts give any greater color of claim against his estate than if the trustee had been any other third person.

Nothing said here is in contravention of the principle contended for by the respondent, as to the investment or disposition of trust funds, or of money or property held by one in a fiduciary capacity, or of a wrongful conversion of partnership funds by one of the partners without the consent of the other partner. The title to the lands was undoubtedly taken in the name of another than Hicks, because of his then legal incapacity to hold in his own name; and the transaction was managed by a very intelligent and honorable member of the bar, (Judge Hogue,) selected by Hicks himself for the purpose.

As to the "Lasch land" of which mention is made, there is nothing charged in the bill which seems to relate to it,

or to any other land than that described as lots 15 and 16 n Tallahassee, and there is no charge that any partnership funds were invested in any other. Mrs. Fitts (Price) states n her answer that the Lasch land was bought with her own money, and in this manner this land is first brought nto the case. Complainant swears that it was bought with he partnership funds, but he does not recollect its cost. Anthony Hicks says Fitts told him it cost $1 per acre, and hat between 50 and 60 acres was planted in corn, potatoes nd ground peas. Latham says there was only 40 acres of t, mostly cleared. Two or three other witnesses say that Fitts told them that Hicks owned one-half interest in it, and hat they were cropping the land together. Here, then, is one witness, complainant, who says that the land was bought with partnership funds; several who heard Fitts say it was owned by the partners and they were working it as partnership property. Here, also, is a crop gathered of 600 bushels of corn and other crops, estimated by the referee to be worth $672, one-half of which, with nearly $200 interest hereon, is charged against the estate of Fitts, without any deduction or credit for any portion of this fodder, which, for aught that appears, may have been fed out to the partnership stock. If Fitts used this produce for his own private benefit, his estate is doubtless liable for the value of one-half of it, and while the complainant was a witness in the case it would have been more satisfactory for the purpose of sustaining the decree if he had shown that no portion of this crop was used in feeding and keeping the partnership cattle. The only testimony on the subject is that of one witness who says that Fitts told him "he had *used*" the crop; and it seems somewhat peculiar that the complainant makes no mention whatever of this land or the crops in his bill of complaint. If, under the circumstances, the testimony is sufficient to overcome the answer of Mrs. Price as to the purchase of this land, and to show that it was owned and used for partnership purposes, it was then a part of the as-

sets of the firm, held in trust for the survivor, for the purpose of a final liquidation of all the partnership affairs; but the land, or the value of it, is not the proper basis of a charge against the estate of the deceased partner, whether it is deemed assets of the firm or lands held by the several owners as tenants in common. The referee charges it against the estate, because, he says, Mrs. Price, holding the title, sold it, (at a time subsequent to the commencement of this suit,) and "*if* the same was deeded to an innocent purchaser for a valuable consideration, and without notice, it is no longer subject to the claim of the complainant," and that "having disposed of a portion of the property in her own wrong is responsible" as administratrix, and *therefore* charges it against the estate. We think the court erred in taking the same view of the matter.

In regard to the value of the personal property which was taken and used or converted by Fitts in his life time, the proper rule in charging the estate would be to ascertain its actual value in lawful money at the time it was taken or used, and add interest at the then lawful rate to the date of decree. As to the personal property of the firm which remained at the time of the decease of Fitts, its cost or value cannot be charged to the estate.

We come now to the account, as stated by the referee, of the partnership of 1866. Complainant states in his bill that no part of the earnings of this business was received by him, but that Fitts received the whole of it. In his testimony he says nothing on the subject, and there is no proof showing what amount of money was realized during 1866 by either of the partners. As the books are not before this court, we must take the statements of the report "that the *earnings* of the partnership in 1866 amounted to the sum of..... $2,449.38

Expenses of shop,..... 15.35

Net earnings,..... $2,434.03

Complainant's share, one-half,.....	1,217.01
Advanced to complainant,.....	359.00
Balance due him.....	$858.01"
Interest is computed on this sum from 1st July, 1866, at eight per cent,.....	497.64
Total included in the judgment,.....	$1,355.65

There are some peculiarities in this statement. First, that although some of the witnesses swore that they worked for the firm there is nothing put down in the account as paid for their labor, and the whole amount of shop expenses for six months is fixed at $15.35. This is not very satisfactory; but in addition to this, the report does not show *how much money* was received by Fitts, and we are at a loss to know how much to charge him with. The *earnings* are stated to be so much, as "obtained from the books." The complainant is said to have received $359, but Fitts is not shown to have received any given sum. It would be unjust to charge the estate with the whole amount of the earnings, as shown by the books, because the earnings may be represented in accounts not collected. Indeed it appears by Hicks' testimony that Mrs. Fitts "collected some of the accounts" from the books *after* Fitts' death, and this was a portion of the "net earnings." Neither the testimony nor the report of the referee show anything against the estate in favor of the complainant for money collected by the deceased partner on account of the earnings of 1866. It is said the books appear to have been mutilated, but although this may enhance the difficulty of ascertaining the proper result, it does not warrant the charge against the estate of an amount of indebtedness for money received, in the absence of evidence that money was received. If there are accounts not collected, the surviving partner should collect them, if they are collectable, out of the debors, and not out of the estate of his late partner.

The referee in his report intimates that a "portion of the property" has been alienated by Mrs. Price "in her own wrong." Whether the property thus disposed of was real or personal is not stated, and there is no evidence upon which this is reported save the allegation in the bill that Mrs. Price had disposed of one mule. The referee's statements that she had "deeded" the property, would imply that she had conveyed some real estate, but there is no evidence of this, and there is no legal or equitable reason for charging one portion of the property with money invested in another with the consent of the complainant himself and even by his own act. The estate is no more liable for the value of the property which may have been held by Mrs. Price in trust for Hicks, that it would be if the trustee had been an entire stranger.

One of the grounds of error assigned is that the court considered the testimony of Hicks the complainant as to communications between himself and his deceased partner. The testimony is given in the form of depositions. Whether upon the hearing any objection was urged against receiving this testimony does not appear, except as it may be included in one of the exceptions to the report, that it is "not sustained by any proper or sufficient evidence." It is perhaps unnecessary to consider the point as to the effect of receiving such testimony when no objection was interposed at the hearing upon this precise ground. We may remark, however, that the provision of the Code, (sec. 331,) which was in force as to this suit, is a *prohibition* against a surviving party giving evidence "in regard to any transaction or communication between" him and the deceased, "when the examination or any judgment or determination in such action or proceeding can in any manner effect the interest of such witness, or the interest previously owned or represented by him," unless the opposite party had been examined in his own behalf in relation thereto.

In the present state of the case upon the pleadings and

evidence, it would not be proper to enter a decree here, and we must therefore reverse the decree of the Circuit Court and remand the cause with directions that such further or amended pleadings may be had in the case as may be deemed necessary, and as the parties may be advised; and that such further proceedings may be had as may be conformable to law and practice of the court and with this opinion.

EDWARD M. CHENEY AND MARIA J. CHENEY, APPELLANTS, VS. PETER JONES, COLLECTOR REVENUE DUVAL COUNTY, APPELLEE.

1. The courts will not declare the action of the Legislature unconstitutional, unless the violation of the Constitution is entirely free from doubt. To hold otherwise the Courts would be assuming powers of legislation, and creating constitutional provisions not before existing.

2. The second section of Article XII of the Constitution, providing that the Legislature shall provide for raising revenue to defray the expenses of the State, and also " to pay the principal and interest of the existing indebtedness of the State," and the seventh section which authorizes the Legislature to provide for the issuing of State bonds "for securing the debt," do not confine the power of the Legislature to the issuing of bonds for such indebtedness only as existed at the time the Constitution was adopted, but refer to any indebtedness "existing" and contemplated by the Legislature at the time it may act on the subject.

3. There is no limitation of the power of the State Legislatures as to the amount or objects of taxation, unless there be restrictions expressed or necessarily implied in the language of the Constitution on the subject.

4. Debts may be created under the authority of law, and the Legislature may levy taxes to pay them, or provide for issuing bonds to secure them and levy taxes to pay the principal and interest thereof.

5. The power of the Legislature of this State over the subject of issuing State bonds is limited by the provisions of the Constitution, because it has prescribed the several subjects and occasions for and upon which the Legislature may authorize their issue; and the legislative power over the subject of taxation is also limited, because the several purposes for which taxes may be levied are in like manner prescribed; the several purposes for which the Legislature may cause taxes to be levied being expressly named in the Constitution, and these purposes being sufficient for defraying the expenses of conducting the affairs of the government of the State.

6. An act of the Legislature authorizing the issuing of bonds to meet the future ordinary expenses of the State, and for which no indebtedness actually exists at the passage of the act, is not warranted by the Constitution.

7. Bonds not lawfully issued, but issued in fact for an indebtedness existing at the time of their issue, may be assumed and made valid by subsequent laws authorizing their issue. Such bonds are good from the date of their authorization, if the indebtedness for which they were irregularly issued remains unpaid.

8. An act of the Legislature authorized the levy of taxes (to pay the interest and for a sinking fund of bonds) whenever one-fourth of such bonds should be sold. It authorized the issuing of a portion of the bonds in exchange for and to secure former past due bonds, and another portion to be sold for cash: *Held*, that whenever one-fourth of the bonds were issued in exchange for the other bonds contemplated, they were *sold* within the import and meaning of the act, and the tax might be levied. But such tax could not be levied for the payment of the interest and sinking fund except to the extent that the bonds had been so issued.

9. When a bill is filed for the purpose of enjoining the collection of a tax on the ground that a portion of the tax is illegal, the bill must show to what extent the tax is illegal in order that the court may enjoin the illegal portion. Unless that portion of the tax claimed to be illegal be definitely shown by the bill, it can be enjoined only upon a future hearing, at which the court may be able to determine what portion should be enjoined.

Appeal from the Fourth Judicial Circuit, Duval County.

The bill in this case was filed for the purpose of enjoining the collector of revenue of Duval county from selling the complainants' lands for an unpaid tax levied under the provisions of the acts of 1871 and 1873, upon the grounds that the tax is not warranted by law on account of the un-

constitutionality of those acts. The bill alleges that at the close of the fiscal year ending October 31, A. D. 1867, prior to the adoption of the present Constitution in 1868, the indebtedness of the State was about $153,239.95, according to the report of the Comptroller, and that the "existing indebtedness of the State " *at the time* of the adoption of this Constitution, and not any subsequent indebtedness, was contemplated in sections two and seven of Article XII, for securing which the issue of bonds was thereby authorized; or, as an alternative proposition, "that there must be a debt existing and ascertained at the time of the passage of any act by the Legislature authorizing an issue of bonds of the State, and that the amount of such bonds so issued, or authorized to be issued, must be confined strictly to the amount of the debt to be secured; otherwise the issue is illegal, as not authorized by the said Constitution; and that the amount of the State bonds aforesaid authorized to be issued, and for the interest and sinking fund of the whole of which a tax is assessed, greatly exceeded any unfunded debt of the State." And it is further alleged that the State bonds referred to "were not issued, or authorized to be issued, to secure any debt existing at the date of the adopting of the Constitution, nor for the specific purpose of securing the debt, nor of erecting State buildings, nor of supporting State institutions, nor of perfecting public works."

It is further alleged that at the time of the passage of the act of 1873, the State of Florida was indebted to L. P. Bayne & Co., of New York, in the sum of $160,000, which indebtedness accrued after the adoption of the Constitution, and that they held $298,000 of the bonds of the State issued subsequent to such adoption, which had been hypothecated with them to secure their said claim; and that the Comptroller pretends that he has negotiated and effected a sale of two hundred and fifty thousand dollars, of the bonds of the one million issued, to said Bayne & Co. at eighty cents on the dollar, when in fact Bayne & Co. had, in pursuance

of an agreement, taken from the State the bonds at eighty cents on the dollar in satisfaction and discharge of their claim.

It is further averred that said taxes have been levied for interest and sinking fund on all of said one million dollars of bonds, including those so delivered to said Bayne & Co., and those still unsold and in the hands of the Comptroller; and it is submitted and alleged that interest on the bonds authorized to be taken up with the proceeds of the sale of the said issue of one million dollars of bonds, or any part thereof, has not been paid, and that no taxes can be legally collected on account of interest or sinking fund of the last mentioned bonds until they are sold.

The complainants pray a degree that the assessment and levy of taxes to pay the interest and to provide a sinking fund for the discharge of the principal is not lawful, and that the proceedings to enforce the collection thereof be enjoined.

Upon a motion for an injunction upon the bill filed, the defendant having appeared by counsel, the Circuit Court refused the injunction and dismissed the bill. The complainants appealed to this court, and say that the court erred in its several rulings and in dismissing the bill.

H. Jenkins, Jr., for Appellants.

The points of fact relied upon for relief, and claimed to be established by the bill and exhibits, are:

1. That the tax complained of is levied upon the complainants' property in Duval county.

2. That the said tax is levied to pay the interest and provide a sinking fund of the bonds of the State of 1871 and 1873.

3. That the said property has been advertised to be sold by the defendant to satisfy the said tax.

4. That the seventh section of Article XII of the Constitution of the State does not contain the words "of the

State," following the word "debt," as printed in the published instrument.

5. That the debt existing at the date of the Constitution, for which no provision had been made, is shown by the Comptroller's report for the fiscal year ending October 31, A. D. 1867, to be $153,239.95.

6. That the amount of the bonds, for the payment of the interest and to provide a sinking fund of which the tax is assessed, greatly exceeded the unfunded debt of the State at the time they were issued.

7. That the said bonds were not issued or authorized to be issued to secure any debt existing at the date of the Constitution, nor of erecting State buildings, nor supporting State institutions, nor perfecting public works.

Points of law—Construction of the Constitution.

1. The words, "the debt," found in the Constitution, Art. XII, sec. 7, should be interpreted to refer only to the debt of the State at the date of the Constitution, the debt that might be created for the erection of State buildings, in support of State institutions and in perfecting public works, 1 Sto. on Const., 921, 922, 930.

2. The words of a Constitution are presumed to have been used with the greatest possible discrimination. 3 Sel., 97; 9 Wheat., 188.

3. "The plain and literal meaning of the language of a Constitution should never be departed from, unless there be strong evidence that the meaning of those who framed the instrument was different from that which its language imports." Story on Const., secs. 320, 451; 24 N. Y. Rep., 487, 504.

4. The Constitution of the State limits the power of the Legislature to issue bonds of the State, by necessary implication, to the purposes of securing the debt existing at the date of the Constitution, of erecting State buildings, of supporting State institutions, and of perfecting public works,

Art. XII, sec. 7, Const.; 15 N. Y., 543-5-6, 558; 3 Seld., 97, 109, 114, 119, 121; 4 Hill, 144; 9 Wheat., 188.

5. An affirmative grant of special power restricts the general authority of a Legislature to the particulars specified. 1 Sto. on Const., secs. 448-9; 13 Mich., 158; 7 Iowa, 275, 277.

6. When a Constitution specifies the purposes for which a power may be exercised, the specification is an implied prohibition against the exercise of the power for any other purpose. Cooley's Con. Lim., 64; 4 Md., 189; 5 Wis., 308.

7. Constitutional prescriptions are mandatory. Cooley's Con. Lim., 78, 150.

8. The act of the Legislature authorizing the issue of the bonds of 1871 is repugnant to the letter and spirit of the Constitution, inasmuch as it authorizes the funding of the debt to be incurred for expenses of the State to accrue in the ensuing year in bonds running for a term of years. Art. XII, sec. 2, Const.; Act Jan'y 26, 1871.

9. The act authorizing the issue of the bonds of 1873 is repugnant to the letter and spirit of the Constitution, inasmuch as it authorizes the sale of the bonds to pay the current expenses of the State. Act Feb'y 21, 1873; Art. XII, sec. 2, Const.

10. The levy of taxes to pay the interest and provide a sinking fund of bonds not issued, but only authorized to be issued, is arbitrary and unreasonable.

11. "The power of taxation which the people have delegated to their government is not an arbitrary one, but limited by the words and spirit of the Constitution and the principle of natural justice." Blackwell on Tax Tit., sec. 4.

12. When there is ambiguity in any clause of a Constition, extrinsic aids may be used to construe it. Cooley's Con. Lim., secs. 55, 65, 67, et seq.; 5 Md., 471; 7 Iowa, 262; 13 Mich., 147.

13. "In construing the language of a Constitution, the courts have nothing to do with the argument *ab inconve-*

nienti, for the purpose of enlarging or contracting its import." 21 Wend., 563; 7 N. Y., 9, 109.

14. Contemporary and practical construction of a Constitution have little weight when, the language is plain, and the people have plainly expressed their will in the Constitution. Cooley's Con. Lim., sec. 71; 17 Ohio, 446.

15. The condition precedent in the act of Feb'y 21, 1873, providing that "no tax shall be levied until one-fourth of the bonds are sold," was not complied with before the tax for the payment of the interest and to provide a sinking fund for the redemption of the bonds authorized by that act to be issued was levied. Act Feb'y 21, 1873.

If the law of 1873 authorizing the issue of bonds is not unconstitutional, then the assessment of three mills for interest and one mill for sinking fund of all the bonds as taxes is illegal, as in violation of the intention of the Legislature expressed in the law. Act Feb'y 21, 1873.

H. Bisbee, Jr., for Appellee.

The State Legislature has power to make laws at discretion, subject only to restrictions imposed by the Constitution of the State and of the United States. Cooley's Con. Lim., 87, 168; 15 N. Y., 543; 27 Vt., 142; Sedg. on Stat. and Com. Law, 184-5-6-7.

"Where the Constitution *is silent,* and there is no clear usurpation of the power distributed to other departments, I think there would be *great danger and difficulty* in attempting to define the limits of this power." (Opinion of Comstock, J., 13 N. Y., 391.)

"Where the Constitution has given a list of the things the Legislature *may not do,* the judiciary cannot extend it." 21 Penn., 146, 162; Sedg. on stat. and Com. Law, 186.

"A State Legislature has jurisdiction of all subjects on which legislation is not prohibited." 15 N. Y., 303; 24 ib., 497; 4 Mich., 244; 18 Ind., 258; 17 Cal., 547; 17 Penn. St., 119.

A statute cannot be declared void because, in the opinion of the Court, it is opposed to the spirit of the Constitution. Cooley, 171; 24 Wend., 220; 20 ib., 381, 383; Sedgewick, 186; 21 Penn., 147, 162.

"A statute may be constitutional, and its taking effect may be made to depend upon some subsequent event." Cooley, 118; 7 Cranch, 382; 13 Grat., 78; 26 Vt., 357; 17 Ohio N. S., 271; 29 Md., 85.

It is submitted that there is no prohibition in the Constitution against issuing bonds to pay or secure any debt of the State, and that that instrument is not susceptible of such a construction, without a departure from rules settled by a long current of decisions.

Whether or not the one-quarter of the bonds issued in 1873 have been sold, within the meaning of the law, is a mixed question of law and fact, and must be determined from the allegations in the bill.

The bill alleges that the State was indebted to L. P. Bayne & Co. in a large sum of money, but submits that a sale to L. P. Bayne & Co. of the bonds of 1873, at the price authorized, and paying said indebtedness authorized from the proceeds of said bonds, was not a sale for cash within the meaning of the law, while the appellee submits that it was.

Cocke, Attorney General, for the State.

This case arose from an application to the Judge of the Circuit Court of Duval county by Edward M. Cheney and Maria J. Cheney to restrain Peter Jones, collector of revenue for the State of Florida and county of Duval, from collecting the tax authorized to be levied by the Comptroller of the State under the revenue laws of 1873.

The appellants allege that by the third section of the XIIth Article of the Constitution of the State of Florida, it is declared that "no tax shall be levied except in pursuance of law."

This is true, and the question presented by the bill asking for an injunction against the tax collector is that the Constitution is violated by the acts under which the revenue is proposed to be collected.

The true legal question presented by the bill is not embraced in the above quoted clause of the State Constitution, which simply says that no tax shall be levied *except in pursuance of law.* It is not claimed by the appellants that the levy is illegal, for it is not denied by the appellee that taxes can be collected otherwise than in pursuance of law.

The tax collector has not violated the law. He has, as far as it appears from the papers on file in this cause, pursued the law, and if he has pursued the law in making a legal levy, then this constitutional objection falls to the ground. The tax collector is merely an executive officer required to levy for the amount he is required to collect.

The appellants allege in their bill that the taxes so assessed and levied are dependent on a right, the validity of which is against the Constitution of this State. Examine the manner in which they present this point and it is as follows:

1. That the taxes are being levied at the rate of forty cents in every one hundred dollars of the assessed value of the said property for the general sinking fund and interest for bonds of 1873, and also fifteen cents on every one hundred dollars for the said value of said property for the bonds of 1871.

It is alleged in the bill that the bonds of 1871 means an issue of bonds under the act of Feb'y 26, 1871, and that according to that statute, "the bonds issued were not to exceed the sum of three hundred and fifty thousand dollars."

There is nothing illegal in the process of the levy or the instructions of the Comptroller set forth in the bill. See act of Feb'y 26, 1871, sec. 7, p. 14.

The assessment and levy is to be taken as done in conformity to law, unless the illegality thereof is charged in

the bill, which is not done, and if done, the manner must be set forth and the facts proven as alleged.

Then it is stated that the bonds of 1873 "were an issue of bonds of the State to an amount of one million of dollars authorized to be executed and issued by another act of the said legislative department passed Feb'y 21, 1873." This is true. See act of Feb'y 21, 1873.

We present now a legal objection set up by the bill of the appellants, and it is certainly destitute of force. It is, "That the legislative department was not authorized to provide for the issue of any such bonds; it was on thecontrary prohibited by the Constitution of said State from exercising any such power, and the bonds so issued under color of the said legislative acts were, therefore, wholly illegal and void of obligation."

Upon what constitutional basis is the said objection made? It is this: "That the 7th section, Article XII, of the said Constitution, which confers the power of providing for the issue of bonds for certain express purposes upon the legislative department, reads correctly as follows, to-wit: 'The Legislature shall have power to provide for issuing State bonds bearing interest for securing the debt, and for the erection of State buildings, support of State institutions and perfecting public works,' and not as printed in the Constitution: 'The Legislature shall have power to provide for issuing State bonds bearing interest for securing the debt (*of the State*) and for the erection of State buildings, support of State institutions and perfecting public works.'"

It is true that the 7th section, XIIth Article, of the Constitution of this State has the words "of the State" enclosed in brackets, as cited in the second quotation just made; and it may be true that the words "of the State" are not in the enrolled copy of the Constitution in the office of the Secretary of State, but it does not appear from any evidence on file; but admit it, as an allegation in the bill not denied, for it appears that the State was not represented in the

court below, and that the bill was not answered on the part of the State, simply a motion for an injunctive order being made, under which the court refused the order and dismissed the bill.

This question of the interpolation of the words "(of the State)" is of so little importance that it needs no consideration, for strike it from the Constitution—from a personal inspection of the enrolled Constitution of 1868, I am ready to admit that the words (of the State) are not in the original—and it avails nothing in the argument of this cause in favor of the appellants.

The interpolation of the printer, or any one else, can have no effect on the original paper. This is a principle well recognized in our courts in reference to the alteration of legal documents.

Then take the sentence as it reads in the Constitution, with the words in brackets left out; and it reads that "The Legislature shall have power to provide for issuing State bonds, bearing interest, for securing the debt." Here I ask what debt? Evidently of the State, for the Legislature could secure no other debt. Then how is the logical connection kept up that the meaning of this clause in the Constitution was applicable to the functions of the Legislature in reference to the State debt?—by continuing the reading of the same clause which goes on to say, without even a comma, "and for the erection of State buildings, support of State institutions and perfecting public works."

Now the meaning of this clause taken in its continuity is so obvious that I desist from further remarks thereon.

The bill as it progresses raises this point next in order:

"That there must be a debt existing and ascertained at the time of the passage of any act of the Legislature authorizing an issue of bonds of the State, and that the amount of such bonds so issued, or authorized to be issued, must be confined strictly to the amount of debt to be secured."

The Constitution says:

"The Legislature shall provide for raising revenue sufficient to defray the expenses of the State for each fiscal year, and also a sufficient sum to pay the principal and interest of the existing indebtedness of the State." Art. 12, sec. 2.

Take the first act under which the bill raises any objection to the levy, the act of the 24th of January, 1871. It says, "That for the purpose of funding the *floating indebtedness of the State,*" the Comptroller shall cause to be prepared, &c., the aggregate amount of bonds not to exceed the sum of *three hundred and fifty thousand dollars.*

Now in this instance the Legislature had before it the evidence of the floating debt of the State, and it decided that it was three hundred and fifty thousand dollars, and authorized the Comptroller to issue bonds up to that amount, which was the principal and interest of the existing indebtedness of the State at that time. At all events, such was and such have been the decisions of the Legislature, and in the absence of all authority upon the subject, the court has no authority to go behind the act of the 26th of January, 1871. In reference to the levy of fifteen cents on every one hundred dollars, it is a local assessment applicable to each county which the Comptroller has a right to order under the statute of 1871. See statute of January 26th, 1871, sec. 7, page 14.

The bill further seeks to stop the collection of taxes for the payment of the interest on the bonds of 1873 for the same reasons. Examine this objection as to the one million issue of bonds. The act of 1873 adopts as the basis of the indebtedness of the State one million of dollars, which was the then existing indebtedness of the State. This is said upon the authority of the law itself, which says: "For the purpose of *funding the present indebtedness of the State,* the Comptroller shall cause to be prepared coupon bonds to the amount of *one* million dollars." See act of 21st of February, 1873, sec. 1.

The bill further assumes that the Legislature violated the Constitution of this State by not confining its power to funding the debt to the exact amount of the existing debt at the date of the adoption of the Constitution.

Examine this section and see wherein consists its logical force. Is it that the Constitution does not allow the Legislative Department to issue bonds for the purpose of funding a debt unless that debt was created before this Constitution was adopted, or in existence at the time, which naturally presupposes that it was created prior to the Constitution? Such position is not sustained by the letter or the spirit of the Constitution. Indeed, would it not paralyze the arm of the Legislative Department and suppress the functional exercises of every branch of the government?

The Constitution of the State of Florida says: "The Legislature shall provide for raising revenue sufficient to defray the expenses of the State for each fiscal year, and also a sufficient sum to pay the principal and interest of the *existing indebtedness* of the State." Art. XII, sec. 2.

This language of the Constitution is sufficiently explicit, and perhaps so lucid as to be beyond the power of learned counsel to render its meaning obscure. Why confine the term "existing indebtedness of the State" to an indebtedness at the time of making the Constitution? If from any cause, and it cannot be denied that from various causes the revenue provided for the expenses of the fiscal year has failed to be sufficient, is there not then left an "existing indebtedness of the State?" And it is not made a duty under the Constitution for the Legislature to provide in the very terms of the Constitution from which I quote, *"a sufficient sum to pay the principal and interest of the existing indebtedness of the State?"*

What is the existing indebtedness of the State? Surely the indebtedness thereof at any time that a legal debt exists, and that the debt did exist at the time of the passage of the two acts under consideration by the Legislature is sufficiently

proven by evidence before the court, and from the very voice of the Legislature uttered in the acts in giving the Comptroller authority to issue the bonds. On this point, see acts of 1871, '73.

We should give a rational as well as practical construction to the Constitution in reference to the taxing power of the government. Especially in an instance like the one under consideration, should we adopt the logic conveyed in the language of our eminent jurist Cooley, who says, "We are not to import difficulties into a Constitution by a consideration of extrinsic facts which have appeared on its face." Cooley Con. Lim., p. 65, 1st ed.

The XII Article of the Constitution relates entirely to taxation and finance; providing a uniform and equal rate of taxation, and also to the means and method of paying the debt of the State.

Taxation is the means; the method used by the Legislature is the constitutional way for raising taxes; and the plan adopted for the use of these means is by the issuing of bonds according to the legally prescribed method or plan under the Constitution. If there are limitations to this method under the Constitution, it is not denied that the Legislature is bound to confine the exercise of its power within the bounds of this limitation. But it is apparent that the bill of the appellants does not show in manner or form wherein the Legislature has departed from the most rigid requirements of the Constitution.

It is difficult to construe away a constitutional power to be exercised by the Legislature, even when this power is involved in the exercise of implied power,much less of of an absolute grant of power. Cooley even goes to this extent and very justly as well as logically says:

"We have elsewhere expressed the opinion that a statute cannot be declared void because opposed to a supposed general interest or spirit, which it is thought pervades or lies concealed in the Constitution, but wholly unexpressed, or

because, in the opinion of the court, it violates fundamental rights or principles, if it was passed in the exercise of a power which the Constitution confers. Still less will the injustice of a constitutional provision authorize the courts to disregard it or indirectly to annul it by construing it away." Cooley Con. Lim., p. 72-3.

It is now the duty of the court to notice two other points made in the bill of the appellants. Before proceeding to notice them, however, it is apparent that the case now before the court comes up on an appeal from an order of the Circuit Court of the fourth Circuit refusing to grant an injunction upon the face of the bill. The facts are not denied; and upon the failure of the State through the attorney by whom it was represented in the court below, if indeed the State was represented, there is no means offered to the State now in the Supreme Court to deny the truth of the allegation on which the equities of the case rested and which must have controlled the decision of the court below. Then the two vital points on which the case rests are upon the legal and equitable force of alleged facts on the one hand, and their being undenied on the other.

1st. The first point then under these undenied allegations in the bill is, as the bill charges, "That at the time of the issue of the said one million of dollars of State bonds, the State of Florida was indebted to one L. P. Bayne & Co., Bankers in New York, in the sum of $160,000, which indebtedness accrued after the adoption of the said Constitution of Florida, and to secure the payment of said indebtedness the said L. P. Bayne & Co. held $290,000 of the bonds of the State of Florida, issued subsequent to the adoption of the said Constitution, which had been hypothecated with the said L. P. Bayne by the State to secure said debt. *That the Comptroller of said State pretends* that he had negotiated and effected a sale of $250,000 of the bonds of the one million issued aforesaid, to said L. P. Bayne & Co., at 80 cents on the dollar, in payment of said indebtedness, and in

pursuance of such agreement said indebtedness was discharged."

The bill admits that if said Comptroller had received the cash for said bonds from Bayne & Co. he would have been authorized by law to pay it over. In other words, the bill makes the point that the bonds were never sold according to law. It is evident from the 10th section of the statute of 1873 what bonds can and cannot be exchanged, and if the court will look into the transaction as it appears from the records of the State showing the contract between the Comptroller and Bayne & Co., made at Jacksonville, April 10th, 1873, it will learn the character of the *exchange* made with Bayne & Co., and whether it was a sale or exchange, and how far it complied with the act under consideration. See second annual message of Gov. Hart, January 6, 1874, with accompanying documents, pages 31, 32.

This point I leave to the consideration of the court as made by the bill. The law makes provision by the said 10th section for the exchange and redemption of five hundred thousand dollars of bonds previously authorized to be issued, with a specification of what outstanding bonds of the State are not to be exchanged; and here is the validity of the point indicated in the bill and in this brief, marked 1.

2d. Then the other point of law upon facts undenied is whether the Comptroller is authorized, under the said act of February 21, 1873, to levy a tax for the payment of the interest and for a sinking fund for an excess of the bonds over and above the amount sold. The law says, "No tax shall be levied until one-fourth of the bonds are *sold.*" See act of February 21st, 1873, sec. 5, p. 13. The expression is not "*exchanged,*" but "*sold,*" and as it will be seen by reference to the 10th section, a distinction is made between what bonds can be exchanged and what cannot be, and it is that class which cannot be exchanged that can be sold. See 2 Parsons on Contracts, p. 436, chap. 4, sec. 11, 2d Boston edition.

Then the question arises as made by the bill, what amount of tax should be levied—an amount to meet principal and interest of the million of dollars of bonds whether sold or not, or to meet the payment of the amount the State owed on its bonds? which amount due could not exceed the amount of bonds sold, for the simple reason that bonds of the State authorized to be sold by the Comptroller create no debt on the part of the State until sold. Did the law contemplate the levying a tax to pay the interest, and also of a certain amount to go into a sinking fund to pay principal and interest on a debt not in existence? By the terms of law all bonds remaining unsold under this act at the expiration of one year from the passage of this act shall not be sold until further legislative action. The expiration of this one year was on the 21st of February, 1874. See sec.—, p. 12, acts of 1873.

These bonds, such as are exchanged or sold, are to run thirty years from date. Let the tax for the million bonds be levied for thirty years to pay the principal and interest on what is the amount sold, not for the amount sold and unsold, how would the money raised by taxation on the unsold bonds be applied, no principal or interest being due thereon, and no debt created for the liquidation of which the sum raised by taxation could be applied?

In concluding this argument, I here take occasion to say that I make no attack on the position of the officers of the State connected with this transaction, but have endeavored to present the law as applicable to this case, considering that the State, which means the people of the whole State, is more interested in an accurate legal termination of the matter herewith connected than any views which some of the representatives of the State might entertain, let them be ever so honest and sincere for the common good of us all.

If the bill of the appellants is untrue, it was the duty of the Comptroller to come in and ask to be made a party and to deny under oath the allegations of the bill. Has he not

by not appearing acknowledged that he did not consider the State as interested?

If the bonds authorized to be sold and exchanged under the act of 1873 had all been sold or exchanged before the 21st of February, 1874, which was required by act of that date, then the levy for the whole amount of interest would be lawful, *and not until then.* That they had not been sold or exchanged before the 16th of February, 1874, nearly the period of the expiration of the time at which they could have been disposed of, I feel satisfied in holding the affirmative, by reference to the following act approved February 16,1874,which authorizes an extension of the time for which they can be *exchanged, not sold.* See acts of 1874, p. 32.

This bill and the points presented for the consideration of the court apply to the levy under the assessment for 1873. Yet I ask leave to call to the attention of the court the 32d section of the act of 1874 for the assessment and collection of revenue:

"For the purpose of securing an equal and uniform rate of taxation, shere shall be annually levied upon the real and personal property of the different counties a tax of seven mills to pay the appropriations made by the Legislature for each year, and a tax of one mill for school purposes, and a tax of three mills to pay the interest on and for the ultimate redemption of the State bonds of 1873, and such tax to pay interest upon and form a sinking fund for the redemption of the bonds of 1871 as is provided by Section 7 of Chapter 1,833, Laws of Florida, passed January 26, 1871."

Now this does provide for the bonds of 1873, but it cannot allude to the bonds not sold, for bonds created by the State payable to bearer, but unsold, are in no legal sense bonds, any more than would my writing a bond purporting to pay to A. a sum of money, which bond, instead of being delivered, I had locked up in my desk and never delivered it.

Taking a full, fair and calm survey of the points of law

presented in this case arising from the face of the bill, and nothing has been denied, what is presented to the court? Three points of law:

1st. A construction of the Constitution as to the power of the Legislature to issue bonds for the purpose of paying the indebtedness of the State. This point of law I have argued.

2d. As to what is a sale, and what an exchange of the bonds alluded to in the act of 1873.

3d. Whether a tax can be levied to pay the principal and interest of State bonds not sold. As to the facts of the 2d and 3d points it may not be for the court now to inquire; they were not denied in the court below and must in a legal sense be taken *pro confesso*. Then I would ask the court to sustain the bill upon these two points, were it not for these objections:

1st. The case is not fully made out so as to enable this court to make a full and final decision as to the sale and exchange of bonds.

2d. The points contained in the bill, even if it is entertained, are not of sufficient weight to decide the matters of law in which the State feels a great interest—not the legality alone of the levy made by the Sheriff of Duval county, but the legality of the assessment of 1873 for the payment of the interest and principal of the bonds of 1873.

Then the case should go back to the court below with directions to amend the bill so as to make the Comptroller a party and allow him to answer and file such exhibits as will bring this case before your honors in that complete condition which will ensure a decision worthy of the great principles here involved.

RANDALL, C. J., delivered the opinion of the Court.

Article XII, section 2 of the Constitution of Florida, reads as follows: "The Legislature shall provide for raising revenue sufficient to defray the expenses of the State for

each fiscal year, and also a sufficient sum to pay the principal and interest of the existing indebtedness of the State."

"Section 7. The Legislature shall have power to provide for issuing State bonds bearing interest, for securing the debt, and for the erection of State buildings, support of State institutions, and perfecting public works."

The Legislature in 1871 (Chapter 1833) enacted, "That for the purpose of funding the floating indebtedness of the State, the Comptroller shall cause to be prepared thirty-year seven per cent. coupon bonds, that is to say, bonds of the State of Florida due and payable thirty years from the date thereof, bearing interest at the rate of seven per cent. per annum, equal to the amount of Comptroller's warrants and Treasurer's certificates now outstanding, and to be issued prior to the first day of January, A. D. 1872; provided, that the aggregate amount of bonds issued by authority of this act shall not exceed the sum of three hundred and fifty thousand dollars."

The act further provided for the levy of a tax of a sufficient sum to pay the interest, and one per cent. of the principal as a sinking fund, annually, upon the amount issued.

In 1872, the Legislature passed a further act in reference to the issuing of these bonds, which act will be hereafter referred to. (Chapter 1,889.)

In 1873 the Legislature passed an act providing for the issue of one million dollars of bonds, with interest payable semi-annually in gold, at the rate of six per cent. per annum, and provided for levying a tax annually of three mills upon the dollar of the assessed valuation of property to pay the interest, and a tax of one mill for the creation of a sinking fund for the ultimate redemption of the bonds; and that no tax shall be levied until one-fourth of the bonds shall be sold. The act required the Comptroller to hold five hundred thousand dollars of such bonds for the purpose of exchanging for and the redemption of the valid bonds of the

State, and to exchange such bonds for a like amount of the principal and unpaid interest of the bonds to be redeemed. But the bonds held by the Seminary and School Fund, the $350,000 of bonds issued under the act of 1871, the bonds issued in aid of railroads, and bonds of 1868 and 1869, which were hypothecated in New York or elsewhere, were not to be so exchanged.

The remaining $500,000 of said bonds were directed to be sold for United States currency at not less than eighty cents on the dollar; and out of the proceeds of the sales the Treasurer should, first, pay the amount necessary to redeem the bonds of 1868 and 1869 from hypothecation, and next, pay the indebtedness of the State accruing after the first day of July next ensuing. Laws of 1873, Chapter 1,937.

I. The first question that is presented is this: Does the Constitution authorize the Legislature to provide for issuing bonds of the State to pay any indebtedness (other than "for the erection of State buildings, the support of State institutions, and perfecting public works,") unless such indebtedness had been incurred, or existed at the time the Constitution was adopted?

No rule of constitutional construction is better settled than that if there be a doubt whether a legislative enactment is strictly constitutional, or that if it be not clearly opposed to constitutional restrictions, the courts will not hold the enactment to be invalid. If the courts were to hold otherwise they would become mere law-makers, undertaking to place obstacles in the way of legislation which had not been plainly placed there by the people in framing the charter itself, and deny to the people represented in the Legislature a power they had not denied to the legislative department.

The Legislature is authorized to raise revenue, that is, levy and collect taxes sufficient to defray the expenses of the State for each year, and also a sum to meet the principal and interest of existing indebtedness. If, as contended by the appellant, it was intended that the "existing indebted-

ness" referred to included only such indebtedness as existed at the time of the ratification of the Constitution, it would have been made entirely clear if it had been so expressed. But it is not so expressed. If it had been written that the Legislature should provide for paying the debts of the State "existing at the time the Constitution is ratified," or equivalent words, there would have been no cavil as to its meaning. That States become indebted from various causes, from extraordinary occurrences, from local or general misfortune, war, pestilence, and famine, beyond the present or immediate means of paying, and for expenditures not strictly included in the terms "expenses of the State," is matter of history in the career of every country. And the occurrences of the few years past, the organization of the government upon new foundations, the misfortunes and poverty of the people, and various causes within the knowledge and recollection of every adult person in this State, affords ample sources for the conclusion that the framers of the Constitution must have anticipated that the expenses of the reorganization of the State and all its municipal divisions would be much greater than could be conveniently borne at the moment of their creation. But what does the language used imply? The Legislature is required to meet annually, and then make provision at their annual sessions for "defraying the expenses of the State," and for "paying the principal and interest of the existing indebtedness." Most surely it contemplates the indebtedness in "existence" at the time of the annual session of the Legislature. If the law should require every man in the State each year to provide for paying his "existing indebtedness" and the interest upon it, could it be seriously insisted that this referred only to his debts existing at the time of the enactment of the law? And yet this is but the import of the language of the Constitution in regard to State indebtedness.

The framers of the Constitution, foreseeing the necessities of the times, and well knowing that the revenues might of-

ten be insufficient to keep the State out of debt, and that enhanced taxes to supply deficiencies would be sometimes oppressive and burthensome, provided that State bonds might be issued to secure the ultimate payment of such indebtedness as might "exist." It is a permanent, continuing provision,and not couched in such language as would confine its operation to the debt existing before its adoption. Constitutional provisions intended to operate upon some isolated or peculiar transaction are usually inserted among "miscellaneous provisions" or ordinances; but this is placed in the chapter or article referring to the current financial transactions of the State. The language is: "The Legislature shall have power to provide for issuing State bonds, bearing interest, for securing the debt," &c. And here we find no language which confines its operation to any transaction or indebtedness antedating the Constitution.

The provision relating to the militia of the State, that "all able-bodied male inhabitants of the State, between the ages of eighteen and forty-five years, who *are* citizens of the United States, or *have* declared their intention to become citizens thereof, shall constitute the militia of the State," obviously intended to include all who were inhabitants at the time of the adoption of the Constitution, and also those who should subsequently become inhabitants and citizens; and yet the language used refers quite as clearly to those only who were *then* inhabitants, as to the sections of the article upon finance refer to the *then* existing indebtedness. The usual and natural interpretation of the language must control, and always with reference to the subject-matter and the evident objects and purposes of its employment.

It is urged that the provisions referred to apply only to such indebtedness as may have existed at the date of the Constitution. If so, it must have been contemplated by the framers of that instrument that without such express authority it was doubtful whether the State to be organized under it would be liable for the debts of the former government,

and that such a provision was proper in order to remove such doubts and to assume such debts as though they were the debts of another government.

But it has been established upon high judicial authority, that as to the State governments there is no limitation upon the power of the Legislature as to the amount or objects of taxation; that the interest, wisdom, and justice of the legislative body, and and its relation with its constituents, furnish the only security against unjust and excessive taxation, unless there be express restrictions upon that power in the Constitution. (Prov. Bank vs. Billings, 4 Peters, 514; Brewster vs. Hough, 10 N. H., 138; Mack vs. Jones, 1 Foster, N. H., 393; McCulloch vs. Maryland, 4 Wheaton, 316; Blanding vs. Burr, 13 Cal., 343.) And if the provisions of the second section of Article XII refer only to the prior indebtedness of the State, and were inserted for the purpose of removing doubts as to the liability of the present government for such debts, it must be construed as a special authority to pay them, and in that case there is no element of restriction to be implied from it as to other subjects.

The second section, it will be observed, has no reference whatever to the issue of bonds, but only to the subject of paying the current expenses of the State and the principal and interest of existing indebtedness. The seventh section refers to the issue of bonds to "secure" indebtedness. And *when* may such bonds be issued? The provision contains no direction upon the subject, and the Legislature may act on the occasion of its first meeting, or the tenth or the twentieth. And what then is its duty? If the State owe a million of dollars at the end of ten years, and owed but half a million at the beginning of the first year, has it no power to "secure" the debt due at the end of ten years? The Constitution contains no suggestion that the State must repudiate its debts incurred in pursuance of the authority of the Legislature; and it must pay or repudiate. Common honesty is quite as respectable on the part of the State as in

an individual, and hence the State will be honest and not repudiate. But the debt is perhaps too much to be paid by our people at once, and they may prefer to pay in instalments with interest. And what is a State bond but a *promise* to pay the principal and interest of its debts, equally binding upon us, whether it be in the form of a bond or an open indebtedness?

The proposition made by the complainant is that taxes cannot be levied except to pay the principal and interest of indebtedness existing at the date of the Constitution, and to meet the current expenses of the State, and to pay for State buildings, and the support of "State institutions." And so the question arises, can the Legislature create a debt without violating the Constitution? If not, then we must pay our taxes into the Treasury in advance to meet current expenses; for, if this be not done, an indebtedness must follow the issuing of every warrant upon the treasury, if there is no money in the treasury at the moment.

We cannot sanction any such absurdity as that valid debts may not be created under the authority of law, and that the Legislature cannot levy taxes to pay the principal and interest thereof; (other than debts existing in 1868, when the Constitution was adopted, and debts incurred "for the erection of State buildings, and support of State institutions;") and it seems to us very plain that if the State owes a debt, at any time, the Legislature may provide for paying it by the levy of taxes. The issuing of bonds does not create a debt, but is simply a means of securing the future payment of principal and interest, and the Legislature may authorize the issue of bonds for that purpose, whenever a debt has been incurred.

II. The question next arises, whether the Constitution authorizes the issuing of bonds of the State for the purpose of securing any indebtedness not yet actually incurred, or for the purpose of raising money by a sale thereof to pay the

ordinary expenses of the State; and do the acts of 1871 and 1873 provide for the issuing of bonds for such purposes?

We have already seen that the general grant of legislative power carries with it by implication and construction all the means necessary for its due execution, and that there is no limitation upon the power of the Legislature as to the amount or objects of taxation, unless such restriction is expressed or necessarily implied from the fundamental law.

Were there no prescriptions in the Constitution of the several objects or purposes for which the Legislature may impose taxes, there would be no limitation upon the power except in the wisdom and discretion of the Legislature. And it is not necessary that a limitation of power should be framed in express terms. If a power is granted to do certain things, as for instance, the levying of taxes for certain specified and enumerated purposes, and it is not *essential* to the carrying out of the purposes of the government that any such power should be exercised except for the purposes specified, the effect of such prescriptions is equally prohibitory as to the purposes not specified as though the prohibition were declared in affirmative terms. (See Cooley's Con. Limitations, 64, 87, 176; People vs. Draper, 15 N. Y., 543; Stewart vs. Supervisors, 30 Iowa, 9; Twitchell vs. Blodgett, 13 Mich., 127, 158; Sharpless vs. The Mayor, &c., 21 Pa., St. Rep., 147; 1 Story's Com., Sec. 448.)

Measuring the power of the Legislature by the terms of the Constitution in respect to the levying of taxes, we find that it is permitted "to raise revenues sufficient to defray the expenses of the State," (which includes such expenditures as may be authorized by the Legislature and which are not prohibited by the Constitution,) and "to pay the principal and interest of the existing indebtedness of the State."

This provision is so broad that we cannot conceive it to be necessary to the due exercise of all the powers of government to travel outside of it for any legitimate object. It erects a boundary also, which we think was intended to pro-

tect the people from errors which sometimes have been committed by Legislatures. It prescribes what may be done, how far the Legislature may go in levying taxes; and upon the principles alluded to, it is a limitation not wanting in directness to amount to a prohibition. And as to the power to issue bonds of the State, it says, "the Legislature shall have power to provide for issuing State bonds bearing interest for *securing* the debt," &c.; and by the same rule, founded in principle and sustained by authority in unbroken currents, it is equally prohibitory as though it should declare that "the Legislature shall have no power to provide for the issue of bonds except for *securing* the debt," &c.

The Legislature in 1871 (Chap. 1833) passed an act providing that "for the purpose of funding the floating indebtedness of the State," the Comptroller should cause to be prepared bonds not exceeding the amount of $350,000, bearing interest at seven per cent., equal to the amount of Comptroller's warrants and Treasurer's certificates now outstanding *and to be issued prior to the first day of January,* 1872, and further authorizing the Comptroller to exchange said bonds for said Comptroller's warrants and Treasurer's certificates at par. A tax was also authorized sufficient to pay the interest and to provide a sinking fund for the ultimate redemption of the principal.

On the 15th February, 1872, another act was passed (Chap. 1889) authorizing the Comptroller to issue the bonds of 1871, not yet issued, for the purpose of taking up Comptroller's warrants issued on and after January 1, 1872.

Was this act of 1871 authorized by the Constitution? From the principles already laid down, we must hold that so far as the act authorized the issuing of bonds to secure any indebtedness, which had accrued up to the time of its passage, it was authorized by the Constitution; and so far as it authorized the issue of bonds at a future time, in exchange for any indebtedness not yet incurred, and growing out of

the ordinary expenses of the State, it was not in accordance with the provision of the Constitution.

A law may be constitutional in part and unconstitutional in part, as it may be in part within the scope of constitutional authority and in part outside of it, if a part of the law can be executed without the aid of that part which is invalid. (See Cooley's Const. Lim., 177, and authorities cited.)

It does not appear, however, from the bill that the outstanding floating indebtedness was less than three hundred and fifty thousand dollars. The act says "not exceeding" that amount may be issued for the purpose of funding the floating indebtedness of the State; and it must be presumed that the Legislature, in authorizing the exchange of these bonds for State warrants issued prior to the ensuing January, referred to warrants to be issued for such indebtedness as *had been* incurred at the date of the act, whether warrants had yet been issued therefor or not.

The act of 1872 is of equal validity with the act of 1871, so far as it authorized the issuing of the bonds provided for by the latter for any actual indebtedness, and so far as the bonds mentioned in these acts were issued to secure any indebtedness which had been incurred up to the 15th of February, 1872, when the act of that date was approved, we cannot hold that they were unauthorized, by the terms or the spirit of the Constitution.

We do not mean to say that an act which is unconstitutional, or any thing done in pursuance of such act can be ratified and made valid by subsequent legislation. This is not the purpose of the law of February 15, 1872, but so far as the law of 1872 authorized the issuing of the bonds of 1871 for any indebtedness which had been incurred at the date of its enactment, it is valid, and the bonds which had been issued up to that date for indebtedness then accrued were from that date good, because they were then authorized by law to be issued.

III. The act of 1873, (Chap. 1,937) authorized the issue of one million dollars of bonds, bearing interest at six per cent. in gold, and provided for the levying of a tax to pay the interest and to provide a sinking fund. Five hundred thousand dollars of these bonds were required to be used in exchange for valid bonds previously issued and the unpaid interest thereon.

So far, upon the principle already referred to, the act and the issue of the bonds for such purpose was authorized by the Constitution; for whatever the language used, whether to be "exchanged" for the indebtedness secured by former bonds, or to "secure" such indebtedness, the effect and the result is the same.

The act of 1873 further directed the remaining half million of bonds to be sold for United States currency at the price not less than eighty cents on the dollar, and out of the proceeds the Treasurer was required to pay an amount necessary to redeem the bonds of 1868 and 1869 from hypothecation, and next to pay the indebtedness of the State to accrue after the first day of July then next ensuing.

We have said that the power of the Legislature to issue bonds was circumscribed and limited to the issuing of bonds for securing existing public indebtedness, the erection of State buildings, the support of State institutions and perfecting public works. The Constitution has specified these as the objects for which bonds may be authorized. The purpose and intent of the Constitution must have been to limit the exercise of the legislative power upon this subject, for we must impute to it some purpose and some object to be accomplished by it. If that was not the object, we must disregard it entirely, for it would be utterly meaningless. We think it was intended to prevent the profligate increase of the public burthens by putting afloat promises to pay more than we received; to prevent the depreciation of our credit by hawking it about at a large discount for the sake of a temporary relief, almost sure to result in future disaster.

And though such disaster has not and doubtless will not overtake the State of Florida on account of any action yet had, the fate of some of the States does serve as an example of the point sought to be guarded by our Constitution upon this subject.

The bill of complaint in this cause alleges that the State was indebted to L. P. Bayne & Co. of New York in the sum of $160,00, and that that firm held a large amount of bonds issued in 1868 and 1869 as security for that indebtedness, and this was doubtless the hypothecation referred to in the act of 1873.

The provision of the Constitution authorizing the issue of bonds to "secure" indebtedness may well, without a too broad or too narrow construction, warrant the sale of bonds for money with which to liquidate an existing indebtedness; for such a transaction is but the "securing" of the same indebtedness transferred from one creditor to another.

We will not here determine whether the sale of the $200,000 in bonds in exchange for or to "secure" $160,000 of actual debt may be authorized under the Constitution. The Legislature has authorized the officers of the State to do that, so far as they could confer such authority, and as there are no parties before us as holders of the bonds, whose interest may be affected, it would be scarcely just toward them or toward the State to determine it in this proceeding, where they have not been heard. But we have no hesitation in holding that the issue and sale of bonds for the purpose of raising funds with which to pay the current and future ordinary expenses of the State is not warranted by the Constitution, and that so much of the act as purposed to give such authority is void.

The act of 1873 further provides that no tax shall be levied for the purpose of paying the interest or the sinking fund until one-fourth of the whole amount of the bonds shall be sold.

The bill alleges that one fourth of the bonds have not been

"sold;" that the Comptroller pretends that he has sold $250,000 of them to Bayne & Co. at eighty cents on the dollar, whereas in fact Bayne & Co. have taken said bonds at eighty cents on the dollar, in pursuance of an agreement, in satisfaction of his claim, and therefore a tax to pay the interest and sinking fund is not authorized by the act; and that a tax has been levied for the payment of the interest and sinking fund of the whole of the one million dollars named in the act, while a great portion of them remain in the hands of the Comptroller undisposed of.

The bill does not disclose what amount if any of the bonds have been sold for cash, or what amount has been delivered in exchange and for the redemption of former valid bonds of the State. As to the words of the act that "no tax shall be levied until one-fourth of the bonds shall be sold," while technically it may be insisted that the word "sold" means exchanged for lawful currency, the word is often used in regard to ordinary transactions among men to include "an exchange for a consideration, whether in money or other valuable thing." This is not necessarily a *barter* and not a *sale*. One may *sell* his horse for an agreed amount and receive in payment a note of the buyer or of a third person. If no part of these bonds had been sold for money, but the half million of past due bonds had been delivered to the Comptroller in exchange for the new bonds, was not this, in the contemplation of the Legislature, a *sale* of the new bonds? Did the Legislature intend that in taking up the old interest bearing bonds and giving in exchange the new, that the holder should have no interest or principal upon the new bonds unless a certain other portion should be sold for money? Did they intend thus to practice "Chinese" sagacity, and play the game of a trickster upon the confidence of its creditors?

We think the Legislature intended to do what the Constitution authorizes: to "secure" the principal and interest of the debts of the State, by providing for their payment.

If, therefore, the amount of one-fourth of the bonds have been sold for cash or by taking up its money obligations, the law intends that good faith shall be kept with creditors, and that they shall be paid according to the promise, and it was the duty of the proper officers to collect the necessary amount of tax for the purpose. The object, however, that a tax was levied to raise the amount of interest and sinking fund upon the whole one million of bonds, including a large amount unsold and yet in the hands of the Comptroller, stands upon a different footing. The Constitution authorizes the raising of taxes for paying the interest and principal of the *debt* of the State. This indebtedness was not created by the printing and signing of the bonds and depositing them in the Comptroller's vault. The amount of tax to be collected for this purpose is the amount accruing upon the bonds legitimately held by the *bona fide* creditors of the State at the time of the levying of the tax, for there is no interest accruing upon bonds not so held.

The bill prays for a decree that the tax levied upon the property of the complainants is not lawful, and that the collection thereof be enjoined.

The bill does not show, however, what proportion of the tax was illegal and what portion was legal. It does not show that the entire amount of the tax, levied to pay interest upon these bonds, was improperly levied. It does not show what amount had been disposed of by the State in payment of or to secure its just debts. It admits that the State owed debts, and that the purpose of the issuing of at least a part of the bonds was to pay and secure them. The bill confines itself, as to that subject, to the sale of one-fourth of the bonds to Bayne & Co., and says nothing of the bonds issued to other parties. If a part of the tax was legally imposed, the collection of such parts should not be enjoined.

The Supreme Court of Michigan, in Conway vs. Waverly 15 Mich. R. p. 263, says: "The bill must be certain enough to furnish the means of giving the precise relief needed

No court can give assistance to a party who does not show what he is entitled to demand. The bill asks relief against what must be presumed to be legal as well as illegal taxes, and the court has no means of ascertaining one from the other, while complainants could have given the means but have neglected to do so."

In Taylor vs. Thompson, 42 Ill., p. 17, the court say: "When a bill in chancery is filed to enjoin the collection of taxes on the grounds that they are in part illegal, the bill must show to what extent they are so, in order that the court may enjoin only the illegal portion, or that they are so levied that it is impossible to discriminate between the legal and illegal portions."

"No objection which did not go to the very groundwork of the tax, so as to affect materially its principle and show it must necessarily be illegal,, ought to have the effect of rendering the whole invalid." Mill vs. Gleason, 11 Wis., 470.

"If the court can, under this bill, ascertain the proportion that the illegal bears to the legal bonds, it could thereby be determined what portion of this tax would be illegal, and when ascertained, the portion of the tax necessary and which would go to pay those illegally issued bonds, should be restrained, and the remainder collected." Briscoe vs. Allison, 43 Ill. R., 291.

The Circuit Court refused to grant an injunction restraining the collection of the entire tax levied for interest and sinking fund of the several bonds issued under the acts of 1871 and1873. We think the court was correct in thus refusing to grant it. The prayer of the bill was too broad in this respect. The collection should be restrained only as to so much or such proportion of the tax as may be shown to have been improperly levied.

For the purpose of determining this, it will be necessary to amend the bill of complaint so that it may appear definitely what proportion of the tax should be collected. Other-

wise it can only be ascertained on the final hearing, upon the proofs.

The court dismissed the bill on the hearing of the motion for an injunction, and in this the court erred, for in the absence of any pleadings on the part of the defendant, there are sufficient facts alleged to show that the complainants were entitled to ultimate relief of some sort, but of which the court should be more definitely informed, so that the precise relief to which they were entitled may be seen by the court.

The order of the Circuit Court dismissing the bill must therefore be reversed.

It was suggested that the Comptroller should be made a party, so that he may answer and file such exhibits as will bring the whole facts before the court. We do not think it necessary that he shall be made a party for that purpose. All the facts within his knowledge and under his control are accessible by the ordinary methods, and he certainly does not desire to be compelled to disclose them.

The decree of the Circuit Court, so far as it dismissed the complainants' bill, reversed.

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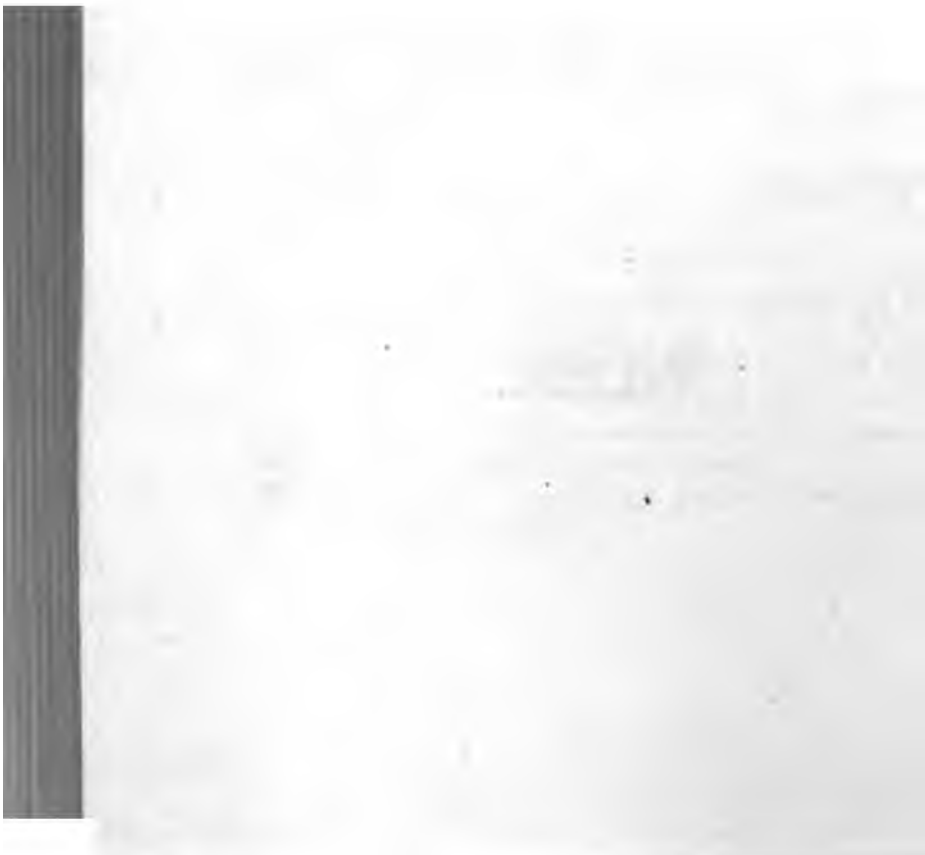

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In the above stated case the respondents insisted that the appellants, Z. A. & Co., were not entitled to the rule against the sheriff, because their judgment had been irregularly entered, and was taken without notice to the defendant therein or his attorneys: *Held,* That as the judgment purported to have been rendered by the court which had jurisdiction of the parties, and had not been set aside or reversed, the regularity of the plaintiffs' proceedings, or of the action of the court in giving judgment, could not be inquired into in this proceeding. Zinn, *et al.* vs. Dzialynski, *et al.* 187

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execution thereon before judgment was obtained in the attachment and the proceeds remained in the hands of the sheriff. The plaintiffs in each suit ruled the sheriff to show cause why the proceeds should not be paid over to him, and the court made one order under the title of both suits, denying the application of the attaching creditor, and directing the sheriff to pay over the money to the plaintiffs, S. & L., after paying twenty dollars to the attorney of the sheriff for preparing his answer to the rules. Z. A. & Co., the attaching creditors, appealed, and the cause appeared upon the docket entitled as of both suits, when S. & L. moved to strike their names and their cause from the docket for the reason that they had not appealed, nor had the defendant appealed, and neither were willing that their suit should be on the docket: *Held*, That Z. A. & Co. had a right to appeal; that the use of the names of all the parties was proper under the form of the order, and that the position of S. & L., as well as that of the defendant, was that of respondents in the appeal.

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In a suit commenced by attachment, under the law of 1833, the levy of the attachment upon personal property gave to the plaintiff a specific lien upon the attached property to the amount of his demand, subject to pre-existing liens, and this lien was not divested or impaired by the subsequent recovery of a judgment by another party against the same defendant before judgment was obtained in the attachment suit; in such case the proceeds of the property attached should be first applied to satisfy the judgment in the attachment suit. The term "pre-existing liens," mentioned in the statute, refers to liens existing prior to the levy of the attachment, and not to any judgment which might be recovered before judgment had in the attachment suit. Zinn *et al.* vs. Dzialynski, *et al*..... 187

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An order making a further allowance in the nature of costs to the prevailing party may be reviewed upon appeal from the judgment entered therefor, for the purpose of ascertaining whether the case is one in which such allowance may lawfully be made, and whether the sum allowed is within that authorized by law; but the Supreme Court will not interfere with the exercise of discretion in making the order for such allowance, or as to the amount allowed, unless it exceeds the amount authorized by law. Hart vs. Bostwick and wife..... 162

CONSTITUTIONAL LAW—

The Constitution of this State provides that certain officers "may be removed from office upon the recommendation of the Governor and consent of the Senate." This power being without limitation, the judicial department of the government cannot create limitations upon it. Neither notice to the officer, nor the making and proving any charge, is essential to its exercise. That an officer may be thus removed is a constitutional incident or limitation upon his right to hold the office, in the same manner as is the limitation of the term to four years, and to be thus deprived of the office without notice or hearing, is not in conflict with that clause of the Constitution which provides that no person shall be deprived of his property without due process of law. State, ex rel. Holland vs. Ledwith..... 220

That the consideration for a contract was Confederate notes does not render the contract illegal. Such notes had an actual value, were a good and legal consideration for an ordinary commercial contract, and in the absence of any actual intent or purpose to aid the persons resisting the authority of the United States, the contract should be enforced by the courts to the extent of its just obligation.

The Constitution of this State provides that "all notes given in consideration of treasury notes of the so-called Confederate States are hereby declared null and void, and no action shall be maintained thereon in the courts of this State." This clause, impairing the obligation of

a contract, and being an attempt upon the part of the State to exercise a power which is prohibited by the express limitations of the Constitution of the United States, the supreme law, is void.

The general government being powerless to regulate the course of justice and prescribe rules of evidence in the State courts, Congress cannot constitutionally require that contracts shall be stamped as a condition precedent to their being admissible as evidence in the State courts. Forcheimer vs. Holly..... 239

The Act of December 13, 1861, suspending the Statute of Limitations, did not have the effect to revive a right of election under the Statute of November 7, 1828, which has ceased to exist by expiration of the time therein limited for its exercise; nor is an election once made set aside and a right to elect again created by the provisions of Section 3, Article XV, of the Constitution of this State. Stephens vs. Gibbes..... 331

The courts will not declare the action of the Legislature unconstitutional, unless the violation of the Constitution is entirely free from doubt. To hold otherwise the Courts would be assuming powers of legislation, and creating constitutional provisions not before existing.

The second section of Art. XII of the Constitution, providing that the Legislature shall provide for raising revenue to defray the expenses of the State, and also " to pay the principal and interest of the existing indebtedness of the State," and the seventh section which authorizes the Legislature to provide for the issuing of State bonds "for securing the debt," do not confine the power of the Legislature to the issuing of bonds for such indebtedness only as existed at the time the Constitution was adopted, but refer to any indebtedness "existing" and contemplated by the Legislature at the time it may act on the subject. Cheney and wife vs. Jones..... 587

DAMAGES, HOW ESTIMATED IN DIFFERENCE BETWEEN COIN AND GREENBACKS—

When a note was made payable in gold coin, and the court permitted evidence to be given by the plaintiff to show the value of gold coin in "greenback" currency at the time the note became due, and instructed the jury that they might find a verdict for such value with interest, and the jury found a verdict accordingly: *Held*, That such ruling and instruction was erroneous. The amount due in gold coin should be the rule of estimating the damages, and the verdict showing such amount due in gold coin should be followed by a judgment for such amount payable in coin. Bowen vs. Darby..... 202

DAMAGES—See title Measure of Damages.

DAMAGES—

Where it plainly appears that the damages awarded by a ver-

dict are excessive and not warranted by the proof, or that the finding as to the amount is contrary to or palpably unsupported by the evidence, the verdict should be set aside. Florida Railroad Co. vs. Gensler & Silberstein 122

DEMURRER—

Where there is a demurrer to the pleadings in the record, and not disposed of by the Court, and not waived or abandoned by new pleadings or otherwise by the party demurring, it is error to submit a cause to a jury. Nelson vs. McLaurin..... 45

DECREE, WHEN REVERSED—

When, upon the whole case, it appears that a decree is prejudicial to the interests of both parties, this court may reverse it upon grounds other than those upon which a reversal is claimed. Coy vs. Downie *et al*..... 544

DISTRIBUTION OF DECEDENTS ESTATE—

W. died intestate May 1, 1862. M. was appointed administrator and published notice as required by Act of Nov. 20, 1828, concerning Wills, &c., Sec. 39. Within two years after such publication, claims were presented by creditors to an amount more than sufficient to absorb the entire estate, which had been converted into money, and a partial *pro rata* dividend made to those claims. The plaintiff, as heir, claimed the residue of decedent's estate in the hands of the administrator undistributed, insisting that all creditors' claims were barred by the statute of limitations, and January 18, 1871, brought suit against the administrator to recover such residue: *Held,*

That no statute of limitations was in force from Dec. 13, 1861, to the institution of suit.

That in respect to this fund raised from the sale of intestate's estate for the purpose of paying debts, the administrator holds the position of trustee for the creditors, whose claims are, or may be lawfully established, against whom the statute of limitations, if in force, does not run so as to deprive them of a *pro rata* distribution of the fund. McDonald vs. Bogue..... 363

DOWER—

Where the widow is entitled to dower in several tracts of land, she may be allotted dower in one tract equal in value to her interest in the whole.

Where such an allotment has been made for several years as to one tract, and other lands are subsequently discovered in which the widow has a right of dower, the first allotment will not be opened at the risk of the widow and against the consent of the executor, in order to

have a new allotment under which she is to acquire additional interests in the first tract, as to which she has ceased to have any further right of dower.

Under the act providing the method of an assignment of dower, the proceeding is special and summary, in which no relief other than that specially authorized can be granted. If it is desired to call into operation the general powers of a court of equity, the proceeding must be by bill. Milton vs. Milton..... 369

DOWER—See title Limitation.

ENDORSER OF A DRAFT, ACTION AGAINST—

In an action against the endorser of a draft, he pleaded that "after the plaintiff informed defendant of his discharge as endorser on the draft in said plaintiff's declaration mentioned, the said defendant, in consideration of the said discharge, paid and discharged other pretended demands held by the said plaintiff against the said defendant, which the said defendant did not consider and believe he was legally bound to pay:" On demurrer, *Held,* That this plea does not set up a legal or equitable consideration for a discharge, but only an alleged reason for paying other claims held by plaintiff. Fridenburg vs. Robinson..... 130

EJECTMENT—

Where a plaintiff in ejectment claims title by virtue of a sale and deed under execution issued upon a judgment recovered by the plaintiff against a "sheriff as *ex officio* administrator" of a deceased debtor, and the defendant in ejectment is a stranger to the judgment, it is incumbent upon the plaintiff to prove upon the trial, in addition to the execution and deed, the judgment and the fact that the sheriff was duly authorized to act as such administrator at the time the suit was brought against him. Duvis vs. Shuler..... 438

EXCEPTION—

When the return upon an appeal from a judgment rendered upon the trial of an issue of law by the court does not disclose an exception taken to the ruling of the court, either before or after judgment, the case cannot be reviewed upon appeal, according to the Code of Procedure, and the appeal will be dismissed. DuPont vs. Baker..... 372

Where the return does not disclose an exception taken during the trial or after the judgment, the case cannot be reviewed in this Court upon any matter arising upon the trial, and the appeal will be dismissed.

In order to reivew a judgment after trial without a jury, a case or exceptions must always be made. This case should contain the facts found by the Judge and his conclusions of law, stated sepa-

rately, the exceptions taken during the trial, and also those taken after judgment to his final conclusions of law.

Where the appellant brings up simply the papers containing the pleadings in the case and the judgment of the court, and the return contains no evidence of any exception taken at any time, or any case or exceptions, or any separate statement of conclusions of law found by the Judge, a waiver of a case and exceptions by the appellee cannot cure the defect. Bogue vs. McDonald..... 66

When a record returned on appeal contains in narrative form what purport to be the proceedings of the court on the trial, the instructions of the Judge to the jury, a motion for new trial, the order of the court denying the motion, exceptions thereto, and exceptions to the rulings of the court upon receiving or rejecting testimony embodied in the statement of the testimony, all in the usual form of a case and exceptions, and all finally signed by the judge, it will be presumed that the case was regularly settled and the exceptions signed in pursuance of the rules of the court, unless the contrary appears by the return. Bowen vs. Darby..... 202

EXCEPTIONS—MUST BE SIGNED BY THE JUDGE—Malley vs. Ingersoll & Watlington..... 200

EXCEPTIONS—APPEAL DISMISSED FOR WANT OF EXCEPTIONS—Bowen vs. Darby..... 202

EXCEPTIONS, TO REPORT OF REFEREE—

For the purpose of reviewing the statement of an account by a referee appointed under the Code of Procedure, who was directed to take and state an account of partnership transactions, and of the partnership property, the debts and credits of the copartnership, what real and personal property was purchased with partnership funds, and to take testimony and report the same in writing upon all the facts and issues in the case, it is not essential, upon an appeal from a decree entered in accordance with conclusions drawn by the referee in his report, for the purpose of review, that exceptions shall have been taken to the report in like manner as exceptions may be required to a report of a master in chancery, to whom matters are referred for adjudication. Price and Wife, *et al.* vs. Hicks..... 566

EQUITY—

Where a party has a demand, payable under the terms of a contract out of a particular asset or fund, a Court of Equity will secure the fund and direct the payment of the demand.

S. agreed to give B. one-half of what he, S., might receive from M. if B. would assist him in certain work then being performed by S. for M. The assistance is rendered, S. dies insolvent, and his claim for the service rendered M. by himself and B. is reduced to judg-

ment: *Held,* That B. is entitled to the benefit of the judgment lien, and to payment of one-half of the sum realized from the judgment. Broome vs. Bisbee..... 23

The loss of a large portion of the estate through the emancipation of the slaves four years after the provisions of the Will had been accepted, and the consequent insolvency of the estate, does not present a case in which, either before or since the statute, a Court of Equity would set aside the election and award dower. Stephens vs. Gibbes 331

That in respect to this fund raised from the sale of intestate's estate for the purpose of paying debts, the administrator holds the position of trustee for the creditors, whose claims are, or may be lawfully established, against whom the statute of limitations, if in force, does not run so as to deprive them of a *pro rata* distribution of the fund. McDonald vs. Bogue 363

A suit in equity cannot be maintained for the purpose of enjoining the levy and sale of personal property under an execution, and for the recovery of damages for the detention, on the ground that the property is exempt from such levy. Ample redress may be had at law. Bryan vs. Long..... 366

Under the act providing the method of an assignment of dower, the proceeding is special and summary, in which no relief other than that specially authorized can be granted. If it is desired to call into operation the general powers of a court of equity, the proceeding must be by bill. Milton vs. Milton..... 369

When a chattel is of peculiar value and character, and the loss of it cannot be fully compensated in damages, equity will interfere and grant full relief by requiring a specific delivery. McCollom vs. Morrison 414

EQUITY—SEE TITLE TRUST FUNDS—

In the absence of special equities, the County and Circuit Courts have concurrent jurisdiction in the matter of the settlement of administrations. Where there has been a suggestion of insolvency under the statute in the County Court, and creditors have filed their claims, the Circuit Court should not take jurisdiction at the suit of such creditors, in the absence of circumstances calling for the exercise of its chancery powers, as distinct from probate or surrogate powers, or unless for some special reason it is made to appear that the County Court cannot administer adequate and complete relief between the parties. The constitutional grant of surrogate and probate jurisdiction to the County Court considered and defined.

Where the jurisdiction of a Court of Equity attaches to such matter for one purpose, it may retain the case for all purposes and make final settlement of the estate. Ritch & Co. vs. Bellamy..... 537

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EXEMPTIONS—

Judgment was recovered in 1868 against A., before the adoption of the present Constitution and exemption laws, and after this Constitution took effect an execution was issued upon the judgment and personal property levied upon of the value of $680, which was claimed by A. as exempt and released from levy. Afterwards the same property was again levied upon and A. died. The widow and heirs now claim the exemption: *Held,*

That the exemption cannot be allowed under the Constitution of 1868 to a greater amount than was allowed by the law of 1866 in force when the judgment was obtained.

That although the right of the heirs to claim an exemption after the death of the debtor was not expressly recognized by the law of 1866, yet it may be allowed under the Constitution of 1868, no right to subject the property so exempted having existed prior to the adoption of the Constitution of 1868, and therefore no right of the creditor being impaired by extending the exemption to the heirs. Alexander, *et al.*, vs. Kilpatrick..... 450

EVIDENCE—

An order of the Judge of the County Court, dated March 12th, 1828, revoking letters and removing one from the office of administrator "for maladministration practiced by the administrator," was offered in evidence and objected to on the ground that the revocation was made for causes other than those provided by statute: *Held,* That as the order was duly entered of record and not reversed or set aside, it was operative, although granted irregularly or upon insufficient grounds, and was properly received in evidence for the purpose of showing such revocation and removal. Hart vs. Bostwick and Wife..... 162

FORCIBLE ENTRY AND DETAINER—

The "act concerning Forcible Entry and Detainer" was not repealed by the Code of Procedure; the proceedings regulated by that act are "special proceedings" within the meaning of the Code. Robinson vs. Dupray..... 261

FREIGHT ON BOARD A SHIP—

The owner has an insurable interest to the full amount of the freight, notwithstanding an advance to be charged against it. Schultz vs. The Pacific Insurance Co..... 74

GOLD COIN AND GREENBACKS—

When a note was made payable in gold coin, and the court permitted evidence to be given by the plaintiff to show the value of gold coin in "greenback" currency at the time the note became due, and instructed the jury that they might find a verdict

for such value with interest, and the jury found a verdict accordingly: *Held*, That such ruling and instruction was erroneous. The amount due in gold coin should be the rule of estimating the damages, and the verdict showing such amount due in gold coin should be followed by a judgment for such amount payable in coin. Bowen vs. Darby..... 202

GENERAL ISSUE— .....

It cannot be alleged for error that the court struck out or refused to strike out a plea alleging only facts which may be given in evidence under the general issue. Davis vs. Shuler..... 438

GRAND JURORS—POWER OF THE COURT TO ISSUE A VENIRE—

Where there is a deficiency of grand jurors, the court, upon issuing a *venire*, may restrict the sheriff in his selection to persons drawn from the list furnished by the county commissioners under sections 2 and 3 of Chap. 1628, Laws of Florida, and the required number of persons may be drawn from such list by the county judge, the clerk of the Circuit Court and the sheriff. The statute does not prohibit such course nor does it direct a different method, and this course is in entire harmony with the spirit and the general intention of the Legislature. Dukes vs. State of Florida..... 499

HOMICIDE—See title Murder.

INDICTMENT—WHAT SUFFICIENT—

It is not essential that an indictment should commence with the words, "The Grand Jurors of the State of Florida." It is sufficient if it commences with the words the *"jurors"* of the State of Florida, where the other entries in the record show that it was found by a grand jury. State of Florida vs. Pearce..... 153

INFANTS INTEREST IN ESTATES, HOW DISPOSED OF—

An order for the sale of the interests of infants in real estate is inoperative, and the deed thereunder is void, unless the provisions of the law have been complied with, so as to give the court or judge jurisdiction of the proceedings under which the order is made. Coy vs. Downie, *et al*..... 544

INJUNCTION—See title Pleadings.

IMPLIED UNDERTAKING TO MAKE A GOOD TITLE TO LANDS—

In every contract for the sale of lands, whatever may be the language in which it is couched, there is an implied undertaking to make a good title, unless such an obligation is expressly excluded by the terms of the agreement.

An offer to make a quit claim deed, which conveys only vendor's

interest, is not a compliance with an agreement to make title in a case where the chain of title upon the public records is defective and broken.

Where the judgment of the court below is based upon the findings of a referee, an appeal brings these findings to this court for review. They are to be treated here as the verdict of a jury, and unless they are against the evidence, this court will not interfere. Where there are conflicts, the credibility of the witnesses will be left to the referee. Holland vs. Holmes..... 391

INSTRUCTIONS TO JURIES—

If a Circuit Judge neglects to comply with the provisions of the act of the Legislature approved January 3d, 1848, relating to instructions to juries and the signing and sealing of his charge, and the instructions given or refused, and exception be taken before the Circuit Court to such omission, upon a motion for a new trial, such neglect will be deemed error, and the judgment reversed. Fridenberg vs. Robinson 130

INSURANCE ON VESSELS—

Schultz vs. The Pacific Insurance Company..... 74

JUDGE—THE SIGNATURE OF IN STATEMENT OF A CASE IN THIS COURT—

The only thing which gives verity to the correction and settlement of a case in this court, is the signature of the Judge. The want of this is a fatal defect. Schultz vs. The Pacific Insurance Company 74

JURY—

It is the function of a jury to compare and weigh the character and credit of witnesses whose testimony is complicated and contradictory. Schultz vs. The Pacific Insurance Company..... 74

JUROR—REGISTERED BY ONE NAME AND SUMMONED BY ANOTHER—

A person who caused himself to be registered as Robert Daniels is known and called Robert Stevens. He is selected, summoned and sworn as a juror under the name of Robert Stevens: *Held,*

That this difference in the name by which the party was registered and the name under which he was summoned was sworn, is not sufficient cause to set aside the verdict, where it appears that he was the identical person registered and the person as to whom the County Commissioners exercised their discretion in selecting jurors for the term. The issues being tried by a person possessing all the legal qualifications to try such issues, neither party can object to this difference in the name. Shaw vs. Newman..... 128

DGMENT—TO BE SIGNED BY THE JUDGE—

For the purpose of review upon appeal from a judgment, the record must contain exceptions signed by the judge who presided at the trial, and the appellate court will dismiss an appeal unless the exceptions were duly signed. A case merely stated and signed by counsel will not be examined. This has been repeatedly held by this court before and since the adoption of the Code. The law does not authorize this court to reverse a judgment upon the mere statement of counsel. Malley vs. Ingersoll & Watlington..... 200

JUDGMENT, WHEN OPENED—

The entry of a judgment against a party who had appeared without giving the eight days notice required by paragraph 2 of section 194 of the Code, and without proof that no answer had been received, is irregular. This irregularity and the peculiar circumstances of this case justified the court in opening the judgment entered herein.

It is improper to unite an action for specific performance against one party, and an action of ejectment against another, in the same suit. Where making a person a party defendant to a complaint seeking a specific performance has this effect, a motion to be made a party defendant should be denied.

The general rule is, that new parties defendant should not be brought in against the will of the plaintiff, unless the presence of such new parties is necessary to the determination of the action. To a complaint for the specific performance of a contract, the parties to the contract are generally the only proper parties. Fagan vs. Barnes 53

JUDGMENT, WHEN REVIEWED—

In order to review a judgment after trial without a jury, a case or exceptions must always be made. This case should contain the facts found by the Judge and his conclusions of law, stated separately, the exceptions taken during the trial, and also those taken after judgment to his final conclusions of law. Bogue vs. McDonald..... 66

JUDGMENT IN CRIMINAL CASE—

The record of a judgment in a criminal case contains this entry, showing the swearing of the petit jury: "Thereupon came a jury, to-wit, (naming twelve persons) who being elected, tried, and sworn the truth to speak upon the issue joined." Following the indictment and plea is also this entry: "The jury was duly impanneled and sworn to try the issue." *Held,* That this is sufficient to show that the jury were properly sworn in accordance with the statute to "well and truly try the issue between the State of Florida

and the defendant, according to the evidence." State of Florida vs. Pearce 153

JUDGMENT—WHEN TO BE ENTERED UNDER THE CODE—

Section 194 of the Code of Procedure, which provides that "in any action arising on contract, for the recovery of money only, the plaintiff may file with the clerk proof of personal service of the summons and complaint on one or more of the defendants, or of the summons according to the provisions of Section 81, and that no answer has been received; the clerk shall thereupon enter judgment for the amount mentioned in the summons against the defendant or defendants, or against one or more of several defendants, in the case provided for in Section 87," is not unconstitutional. Gamble vs. J. P. & M. Railroad..... 226

LIEN, UNDER LEVY OF ATTACHMENT—

Zinn *et al.* vs. Dzialynski, *et al*..... 187

LIMITATIONS—

In an action to recover the possession of real estate, the defendants answered that the action was not instituted within seven years next after the cause of action accrued, excluding the period of time between the 10th day of January, 1861, and the 25th day of October, 1865. The third section of an act providing for the stay of executions, approved December 13, 1861, enacted that "the statutes of limitation now in force in this State in relation to civil actions of every description, be and the same are hereby suspended, and shall have no operation or effect so long as this act may continue in force and unrepealed:" *Held,* That the plea was bad for the reason that this law suspending the statutes of limitation was in force and unrepealed, and that there has not been any law in operation limiting the time for commencing civil actions since the date of its passage.

Prior to January 8, 1848, the statute limited the time for commencing an action for the recovery of the possession of lands to twenty years from the accruing of the cause of action. At that date, the time for commencing the action was changed by law to seven years; *Provided,* The act should not operate retrospectively, but from its approval; that the former statute should control until the expiration of seven years from such approval, and not afterwards. The plaintiffs requested the judge to charge the jury that if they should find "that the deed under which defendant claims color of title bears date prior to the 8th day of January, 1848, the defendants must prove an adverse possession of twenty years in order to constitute a bar under the statute." The court refused the instruction and charged that the statutory period was seven years: *Held,* That the judge ruled correctly in refusing the instruction. If the period of twenty years of adverse possession elapsed before the expiration of seven years from the 8th of

January, 1848, the action was barred under the former statute; otherwise, it was barred upon the expiration of seven years after that date. That inchoate rights, depending for their existence upon the statute itself, are subject to be abridged or modified by law, and a statute of limitation may be changed with reference to existing rights, provided a reasonable time is given, after the change and before it would operate as a bar, to exercise the right or to commence suit. Hart vs. Bostwick and wife..... 162

Under the statute of November 7, 1828, (Thom. Dig. 184,) where express provision is made for the widow in the last Will and Testament of the late husband, she is required to dissent thereto within twelve months from the probate of the Will in order to an assignment of dower. At common law no time within which an election should be made was prescribed. The effect of this Statute is to fix the period during which she may elect. If that time expires, the provision made in the Will becomes obligatory upon her and her right of election is lost.

The loss of a large portion of the estate through the emancipation of the slaves four years after the provisions of the Will had been accepted, and the consequent insolvency of the estate, does not present a case in which, either before or since the Statute, a Court of Equity would set aside the election and award dower.

The Act of December 13, 1861, suspending the Statute of Limitations, did not have the effect to revive a right of election under the Statute of November 7, 1828, which had ceased to exist by expiration of the time therein limited for its exercise; nor is an election once made set aside and a right to elect again created by the provisions of Sction 3, Article XV, of the Constitution of this State. Stephens, *et al.*, vs. Gibbes..... 331

W. died intestate May 1, 1862. M. was appointed administrator and published notice as required by Act of Nov. 20, 1828, concerning Wills, &c., Sec. 39. Within two years after such publication, claims were presented by creditors to an amount more than sufficient to absorb the entire estate, which had been converted into money, and a partial *pro rata* dividend made to those claims. The plaintiff, as heir, claimed the residue of decedent's estate in hands of the administrator undistributed, insisting that all creditors' claims were barred by the statute of limitations, and January 18, 1871, brought suit against the administrator to recover such residue. *Held*:

That no statute of limitations was in force from Dec. 13, 1861, to the institution of suit. McDonald vs. Bogue..... 363

Under the first and tenth sections of the act of February 27, 1872. Legislature prescribed a limitation to an action upon a promissory

note of five years from the date of the accrual of the action. Under the 19th section, "all actions not heretofore barred by statute" were excepted from the operation of the limitation until six months after its approval. The words "not heretofore barred by statute" construed. The effect of the enactment was to fix a limitation of six months in such cases.

Where a statute of limitations prescribes the time within which a a suit shall be brought, and a part of the time has elapsed, effect may be given to the act, and the time yet to run being a reasonable part of the whole time, will be considered the limitation in the mind of the Legislature in such cases. Under the circumstances of this case, six months held to be a reasonable time. Spencer vs. McBride..... 403

MANSLAUGHTER—See title Murder.

MARRIED WOMEN—EXAMINATION OF IN CONVEYING REAL ESTATE—

The private examination of a married woman required by the acts of February 4, 1835, and March 6, 1845, for the conveyance of her real estate, is properly taken by the clerk. Fleming and Daniel vs. Susan A. Nix and Selph..... 268

MEASURE OF DAMAGES—

In an action for the conversion of ordinary merchantable property, the measure of damages is the value of the property at the time of the unlawful conversion, with interest to the time of the verdict. Moody vs. Caulk 50

MORTGAGES—

The act of November 25th, 1828, (Thompson's Digest, 183,) declaring mortgages upon personal property not "effectual or valid to any purpose whatever," unless recorded in the records of the county where the property is at the time of the execution of the mortgage, &c., is not applicable to mortgages upon vessels owned within the United States; such mortgages and the record thereof are to be considered with reference to legislation by the Congress of the United States within the powers of Congress respecting the "regulation of commerce." Cunningham vs. Tucker, *et al*..... 251

Where a mortgage for purchase money is sought to be foreclosed, and the the deed of the premises contained covenants, the mortgagor may resist the foreclosure by a recoupment or offset of damages for a breach of the covenants, to the extent of the damages sustained, for a failure or partial failure of title, or any other matter embraced in the covenants.

Where a mortgage was executed and delivered to a third person, to be held by him until certain essential conditions were complied with by the complainant, for whose benefit the mortgage was executed, a decree

of foreclosure should not be made until the conditions are complied with. Coy vs. Downie..... 544

MUNICIPAL CORPORATION—ITS RIGHTS AND FRANCHISES—

The right to be a municipal corporation is a franchise which the State may grant or withhold at its pleasure. The right to file an information in the nature of a *quo warranto*, or to institute a civil action to arrest a usurpation of such a franchise, does not belong to the individual citizen. The right to institute such proceedings against an existing *de facto* municipal corporation is in the State, and the institution of the action is a matter in the discretion of the Attorney General. Robinson, *et al.*, vs. Jones..... 256

MURDER, CHARGE OF THE COURT—

The Court charged the jury that "the killing being proved, though nothing else be shown, the offence is murder, the burthen of extenuation being thrown on the accused:" *Held*, that this is erroneous. Under the laws of this State, (1868,) it is for the jury to determine from all the circumstances of the case, whether the offense is murder in the first, second or third degrees, or manslaughter, or justifiable or excusable homicide. The presumption that the offence is murder, manslaughter, or justifiable or excusable homicide, is a presumption of fact to be found by the jury, and not a presumption of law to be drawn by the Court. Such a charge is not "exclusively on points of law," as is required by our statutes. The opinion of the Court in Gladden vs. The State, and Dixon vs. The State, 13 Fla. Rep., commented upon.

Where, under an indictment for murder, the Court charged the jury that "if you find the prisoner guilty, it is for you to say from the evidence whether he is guilty of murder in the first, second or third degree; if you find from the evidence he is not guilty in either degree, you will return a verdict of not guilty," this is held to be error, as it precluded the jury from finding a verdict for manslaughter, and as they did not find him guiltless, they were forced to find him guilty of murder. Dukes vs. State of Florida..... 499

NEW NOTE IN PAYMENT OF AN ANTECEDENT DEBT—

Giving a note for an antecedent debt is not a payment of it, unless the note be received under an express agreement, or under circumstances from which an agreement may be fairly implied to treat it as a payment, or unless payment in fact result from it.

An agreement by a debtor and creditor that the creditor will, at a future day, accept new notes and securities in lieu of those held, giving additional time of payment of the indebtedness, cannot be enforced un-

less some valid consideration be received by, or benefit or advantage has accrued thereby, to the creditor. May & Sloan vs. Gamble..... 467

NEW PARTIES—See Fagan vs. Barnes..... 55

NEW TRIAL—

A new trial should not be granted as against the weight of evidence, unless the preponderance is such as to warrant the opinion that the verdict was produced by improper influences; and particularly where two juries have rendered the same verdict upon the same state of facts. Wilson vs. Dibble..... 47

If a Circuit Judge neglects to comply with the provisions of the act of the Legislature approved January 3d, 1848, relating to instructions to juries and the signing and sealing of his charge, and the instructions given or refused, and exception be taken before the Circuit Court to such omission, upon a motion for a new trial, such neglect will be deemed error, and the judgment reversed. Fridenberg vs. Robinson 130

The Court trying the cause should be accorded a liberal discretion in granting or refusing a new trial. Moses vs. Gilchrist and Son 325

PARTIES—

To a complaint for the specific performance of a contract, the parties to the contract are generally the only proper parties. Fagan vs. Barnes..... 53

Where the subject of an action is real or personal property, and the plaintiff seeks to set aside fraudulent judicial proceedings in reference thereto, he should make all persons parties who were actors in such proceedings, and who claim a present interest in the specific property. Such a complaint is not liable to the objection that there is an improper joinder of several causes of action against different persons. It sets up one cause of action against all of them. Howse vs. Howard 59

PARTNERS AND PARTNERSHIP RIGHTS—

F., a free white man, and H., a slave, in 1863 carried on business as partners, the slave's master being paid an agreed sum for his hire, and real and personal property were purchased with the profits of the partnership business; and after H. became free, the partnership business was renewed upon terms which recognized H.'s rights as a partner while he was a slave; *Held*, that the rights of H. in the partnership business, and in real and personal property so acquired during servitude, must be recognized to the same extent as though he had been free.

Where land is purchased by partners with partnership funds for partnership use and convenience, and conveyed to them in such

manner as to make them tenants in common, it will be treated and considered in equity as vesting in them in their partnership capacity, and to be applied to partnership purposes, for the satisfaction of the partnership creditors and of the claims of the individual copartners as between themselves in the settlement of the copartnership affairs, as against dower and the claims of heirs-at-law.

Where land is purchased by partners with partnership funds, but *not* for the use and convenience of the partnership business, or in the legitimate line of their partnership business, they become invested with the title as tenants in common, and their respective interests therein are several.

Where two partners purchase real estate with joint funds, taking the title in the name of the wife of one of them, her title is subject to a resulting trust in favor of the individual partners and the rights of their creditors.

When one of two partners dies, the survivor is entitled to the possession and disposition of all the partnership property, and in a suit by him instituted for the purpose of closing up the affairs of the copartnership and to recover from the estate of the deceased partner any amount due him from the deceased, it will be improper to include in a decree in favor of the survivor any amount invested by the partners in real or personal property, unless such property had been disposed of by the deceased partner, or for his use, in his lifetime. The fact that the title to land purchased by partners with partnership funds was taken in the name of the wife of one of the partners, since deceased, or that any of the property of the copartners has been disposed of by the widow, or that she has collected money due on partnership accounts, affords no ground for charging the estate of the deceased partner at the suit of the survivor. A surviving partner cannot charge the estate of the deceased partner for a share of the earnings of the copartnership which remain in open account against their customers, or which were not paid to or realized by the deceased in his life time. Price and Wife, *et al.* vs. Hicks 565

PLEADING—

The general rule is, that new parties defendant should not be brought in against the will of the plaintiff, unless the presence of such new parties is necessary to the determination of the action. Fagan vs. Barnes 53

A cause of action against the sureties upon the bond of an administrator, arising from a breach of the condition of the bond, cannot be united in the same complaint with a cause of action against the administrator arising from acts of the deceased intestate in fraudulently disposing of his property. This is an improper joinder of

several causes of action against different parties in the same complaint. Howse vs. Howard..... 59

A general appearance by pleading to a complaint or declaration confers jurisdiction of the parties, and no defect in the original process, or in the return, or manner of service, can be urged as ground for reversing or setting aside the pleadings, after such appearance. Florida Railroad Company vs. Gensler & Silberstein..... 122

In an action against the endorser of a draft, he pleaded that "after the plaintiff informed defendant of his discharge as endorser on the draft in said plaintiff's declaration mentioned, the said defendant, in consideration of the said discharge, paid and discharged other pretended demands held by the said plaintiff against the said defendant, which the said defendant did not consider and believe he was legally bound to pay:" On demurrer, *Held*, That this plea does not set up a legal or equitable consideration for a discharge, but only an alleged reason for paying other claims held by plaintiff. Fridenberg vs. Robinson..... 130

PLEADING—PERSONAL SERVICE UNDER THE CODE—

Section 194 of the Code of Procedure, which provides that "in any action arising on contract, for the recovery of money only, the plaintiff may file with the clerk proof of personal service of the summons and complaint on one or more of the defendants, or of the summons according to the provisions of Section 81, and that no answer has been received; the clerk shall thereupon enter judgment for the amount mentioned in the summons against the defendant or defendants, or against one or more of several defendants, in the case provided for in Section 87," is not unconstitutional. Gamble vs. J. P. & M. Railroad..... 226

A defendant, by availing himself of the leave of the court to amend answers which have been pronounced insufficient in law upon demurrer, elects to change his defences, and the sufficiency of the original answer as a defence to the action is not brought up for review by this court upon an appeal from a final judgment rendered for the plaintiff upon the amended answer.

That the return fails to disclose any issues of fact or law upon the amended answer thus filed will not be sufficient cause to reverse the judgment where the matters set up in the amended answer are not sufficient answers to the complaint, and the judgment will be affirmed if there is no error in other respects. Forcheimer vs. Holly, 239

Orders allowing injunctions and appointing receivers are subjects of appeal to the Supreme Court, according to the statutes of this State. Cunningham vs. Tucker, *et al*..... 249

The allegations in a complaint or in the accompanying affidavits filed upon an application for injunction and receiver should show

by direct and positive statements the facts entitling the party to the relief prayed and to the exercise of the summary process of the court, and not merely upon information and belief unsupported by other evidence. The exception to this rule is that a preliminary injunction is sometimes allowed upon allegations founded upon information and belief until, under an order to show cause, a hearing can be had and better evidence adduced. Cunningham vs. Tucker, *et al.*, 251

The statement in the affidavit verifying a complaint of the facts relied upon to obtain permanent injunction, must be direct and positive, and not merely that "*some* of the statements are true," and that others are made upon information and belief.

Plaintiff seeks to restrain the defendant from entering judgment upon an award made by referees mutually agreed upon. The reference contained no stipulation that the award be made a rule of court, and no action was pending. The Judge, upon request, appointed the referees and directed them to make their report as soon as practicable. *Held*: That neither under the Code, nor under the act of 1828, relating to arbitration, was the court authorized to render judgment upon the award without suit or without written agreement to that effect, and as the appellant, for aught that appears, has full opportunity for making his defence at law, the process of injunction will not be granted. Coxetter vs. Huertas..... 270

An answer alleging that defendant has no knowledge or information sufficient to form a belief as to a material fact set up in the complaint, constitutes an issue under the Code.

Under a judicial sale of personal property in the possession of a defendant in execution under a contract of purchase, the vendor having retained the title, and the defendant having made partial payment, the plaintiff in execution crediting his bid upon the execution acquires such interest only as the defendant in execution had.

Where it appears from defendant's pleadings that the vendee in the original contract to sell has done such acts as estop him from denying the corporate character of the vendor, then the purchaser at such judicial sale is likewise estopped from denying it, and a defense putting the corporate character in issue is frivolous.

Where it appears from the defendant's pleadings and the written contract of purchase on file that the corporate character of the vendor was admitted by the vendee, and the purchaser at the judicial sale in his answer admits negotiations by vendee with vendor as a corporation, and upon a motion to strike out a defense denying the corporate existence as sham, no affidavit is made of the truth of the answer, such defense should be stricken out as sham.

Where there is apparently a meritorious defense pleaded with such uncertainty that its precise and full nature is not shown to the Court, it should not be stricken out as sham or frivolous. The plain-

tiff's remedy is by motion to require the pleadings to be made definite and certain by amendment. Sharp Co. vs. Holland..... 384

PLEADING—See title General Issue.

PROMISSORY NOTE, POSSESSION BY THE PLAINTIFF—

Case of McNealy vs. Gregory sustained. Brown vs. Bell & Johnson 71

QUO WARRANTO AT THE DISCRETION OF THE ATTORNEY GENERAL—

The right to be a municipal corporation is a franchise which the State may grant or withhold at its pleasure. The right to file an information in the nature of a *quo warranto*, or to institute a civil action to arrest a usurpation of such a franchise, does not belong to the individual citizen. The right to institute such proceedings against an existing *de facto* municipal corporation is in the State, and the institution of the action is a matter in the discretion of the Attorney General. Robinson, *et al.*, vs Jones..... 256

REAL ESTATE—HOW CONVEYED BY MARRIED WOMEN—

See title Married Women.

RECEIVER—SHOULD NOT BE HEARD IN MOTION TO RESTORE PROPERTY OR FUNDS—

The Defendant, a Railroad Company, moved to vacate an order previously made appointing a Receiver. To this the plaintiffs consented. The receiver objected. The court ordered the receiver to restore the railroad, its appurtenances and management to the company, but required him still to receive and disburse its earnings. Held to be error. The motion should have been granted so far as to restore to the owner the possession, management and control of the road, including the receipt and disbursement of its future earnings. The receiver should not have been heard in opposition to this motion. L'Engle vs. F. C. Railroad Company, *et al*..... 267

REFEREE—POWERS OF—

The report of the findings of facts by a referee, being in the nature of a special verdict, this court will not disturb such findings when they are supported by evidence, the referee being the judge of the weight of the evidence and the credibility of the witnesses.

The referee is the judge of the sufficiency of the impeachment of a witness and the extent to which his credibility may have been impaired, in like manner as he is the judge of the other facts.

Negligence is a question of fact, also, for the referee to determine upon all the evidence in the cause relating thereto. Richardson vs. Russ..... 464

REMOVAL FROM OFFICE—See title Constitutional Law.

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REAL ESTATE—TITLE THERETO AND EVIDENCE THEREOF—

A paper purporting to convey a title of real estate, dated July 24, 1823, acknowledging payment of purchase money and signed, but not sealed, did not convey an estate of inheritance. An act regulalating conveyances, approved August 31, 1822, declared that no estate of inheritance or freehold for more than two years should be conveyed except by writing, sealed and delivered. Hart vs. Bostwick and Wife..... 162

REPLEVIN—

While a suit in replevin is pending, in which the property in controversy has been delivered to the plaintiff by the sheriff, in pursuance of the statute, an action by the defendant against the plaintiff in the replevin suit cannot be maintained to recover the value of the property. During the pendency of the replevin suit, the property is actually or constructively in the custody of the law; the remedy must be had by action against the plaintiff in replevin, or upon the bond, after judgment in favor of defendant upon a trial or dismissal of the suit.

While such replevin suit is pending, the plaintiff, or his representatives, filed a bill in chancery against the defendant, and another for the purpose of annulling the contract of sale, under which the defendant in the replevin suit became possessed of the property, and to stay proceedings in the replevin suit. This suit in chancery remained at issue for several years, neither party bringing it to trial or hearing, and meantime the plaintiff and complainants died: *Held*, That these circumstances afforded no ground for a suit in equity by defendant in the replevin suit against the present administrator of the plaintiff solely to recover the value of the property, the two first mentioned suits being undisposed of. Miller vs. White..... 435

RULE—AGAINST SHERIFFS—

Zinn, *et al* vs. Dzialynski, *et al*..... 187

SHIPS—CARE IN THE NAVIGATION OF—

The question of seaworthiness and care in the navigation of the ship are questions of fact, dependent upon nautical testimony. Schultz vs. The Pacific Insurance Co..... 74

SHIPS—RESPONSIBILITY OF MASTERS—

In determining whether the master designedly cast away and destroyed his vessel, the jury must be satisfied beyond a reasonable doubt that he did so, before they can find against him. The rules of evidence are the same in civil and criminal cases. The character of the fact to be proved, and not the position of the party, determines the degree of proof to be required. *Ibid*..... 74

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SECURITY ON A BILL, WHEN DISCHARGED—

If, after a bill becomes due, the holder for adequate consideration agrees with the drawee of the bill to give him further time for payment without the concurrence of the other parties entitled to sue such drawee, they will, in general, be discharged from all liability. So, also, if the holder, without such consideration, take fresh security or a new bill, and agree to give time without the concurrence of the other parties. But a mere agreement to delay without consideration will not bind the holder, and therefore will not discharge the other parties. Fridenberg vs. Robinson..... 130

SLAVE—CONTRACT RECOGNIZED IN FREEDMAN MADE WHEN A SLAVE—

See Price and Wife vs. Hicks..... 565

SPECIFIC PERFORMANCE—

It is improper to unite an action for specific performance against one party, and an action of ejectment against another, in the same suit. Where making a person a party defendant to a complaint seeking a specific performance has this effect, a motion to be made a party defendant should be denied. Fagan vs. Barnes..... 53

STATUTES—CONSTRUCTION OF—

Statutes upon the same subject matter must be construed together. A statute repealing another statute on the same subject, and prescribing a new rule, is designed to remedy the evils consequent upon the enactment of the statute which it repeals, and when the nature of the evil to be remedied and the remedy conceived by the Legislature are plain, the statute must be so constructed as to advance the remedy and repress the evil. Spencer vs. McBride..... 403

STATE BONDS—

The power of the Legislature of this State over the subject of issuing State bonds is limited by the provisions of the Constitution, because it has prescribed the several subjects and occasions for and upon which the Legislature may authorize their issue; and the legislative power over the subject of taxation is also limited, because the several purposes for which taxes may be levied are in like manner prescribed; the several purposes for which the Legislature may cause taxes to be levied being expressly named in the Constitution, and these purposes being sufficient for defraying the expenses of conducting the affairs of the government of the State.

An act of the Legislature authorizing the issuing of bonds to meet the future ordinary expenses of the State, and for which no indebtedness actually exists at the passage of the act, is not warranted by the Constitution.

Bonds not lawfully issued, but issued in fact for an indebted-

ness existing at the time of their issue, may be assumed and made valid by subsequent laws authorizing their issue. Such bonds are good from the date of their authorization, if the indebtedness for which they were irregularly issued remains unpaid.

An act of the Legislature authorized the levy of taxes (to pay the interest and for a sinking fund of bonds) whenever one-fourth of such bonds should be sold. It authorized the issuing of a portion of the bonds in exchange for and to secure former past due bonds, and another portion to be sold for cash: *Held*, that whenever one-fourth of the bonds were issued in exchange for the other bonds contemplated, they were *sold* within the import and meaning of the act and the tax might be levied. But such tax could not be levied for the payment of the interest and sinking fund except to the extent that the bonds had been so issued. Cheney and Wife vs. Jones 587

SURETY—

When the payee or holder of a note by a valid contract with the principal debtor agrees to give further time of payment beyond the time mentioned in the note, without the consent of the surety upon the note, such agreement will release the surety. And where the surety signs the note as a joint principal, whether the fact that he is a surety be apparent upon the note or not, he may, under the present law of this State, in an action upon the note, show in his defence the agreement between the principal and the holder, entitling him to a discharge. Bowen vs. Darby..... 202

SURETIES ON ADMINISTRATION BOND. See title Administration Bond.

TAXES—POWER OF THE LEGISLATURE TO AUTHORIZE A LEVY—

There is no limitation of the power of the State Legislatures as to the amount or objects of taxation, unless there be restrictions expressed or necessarily implied in the language of the Constitution on the subject.

Debts may be created under the authority of law, and the Legislature may levy taxes to pay them, or provide for issuing bonds to secure them and levy taxes to pay the principal and interest thereof. Cheney and Wife vs. Jones..... 589

TAXES, BILL ENJOINING THE COLLECTION OF—

When a bill is filed for the purpose of enjoining the collection of a tax on the ground that a portion of the tax is illegal, the bill must show to what extent the tax is illegal in order that the court may enjoin the illegal portion. Unless that portion of the tax claimed to be illegal be definitely shown by the bill, it can be enjoined only

upon a future hearing, at which the court may be able to determine what portion should be enjoined. *Ibid*..... 589

TRANSFER OF CAUSE FROM ONE CIRCUIT TO ANOTHER—

An order transferring a cause to another circuit, made by a Judge who is disqualified to try the cause, must specify the county to which the cause is sent; merely ordering the transfer to another Circuit effects nothing, and the order should show the cause for making it. Smith vs. Gibson..... 264

TRUST FUNDS—

The Freedman's Savings and Trust Company, Plaintiff, advanced a sum of money upon certain commercial drafts, which were afterwards dishonored. The charter of the Savings and Trust Company does not authorize such use of moneys deposited with it, but requires them to be invested in certain other securities: *Held*, That the plaintiff may recover such moneys in an action for money had and received, irrespective of the drafts.

In an action by such corporation to recover money, so advanced, the Circuit Court issued an injunction against the defendants, who were partners, to restrain them from disposing of or intermeddling with their property, and appointed a receiver of the partnership effects, including a saw mill, and directed the receiver to continue to operate the mill, on the ground that the money obtained by them from the plaintiff was "trust funds," and that such money had been employed by them as a capital in the prosecution of their business of manufacturing lumber at the mill, and that the partners, and others interested as their creditors, had consented and verbally agreed that plaintiff should be first paid out of the earnings of the mill, which agreement had been violated by them: *Held*, That such "trust funds" having been expended by the defendants in the prosecution of their business and not invested in any existing tangible property, but so expended that such moneys cannot be traced and identified, there is no ground of relief in equity or for the issuing of an injunction or the appointment of a receiver; and the violated agreement that the debt should be first paid out of the earnings of the mill, creates no lien upon the mill, and affords no ground for resorting to such remedies. Allen & Farrar vs. Freedman's Savings & Trust Company..... 418

UNDERWRITER—

The underwriter is not liable to indemnify the insured for losses by the peril insured against, directly incurred through the frauds or gross misconduct of the insured.

The insurer can relieve himself by showing that the efficient and direct cause of encountering the peril was the failure on the part of the insured to act in good faith toward the insurer, or to exercise

ordinary prudence in the management, navigation and care of the vessel. Schultz vs. The Pacific Insurance Company..... 74

VERDICT—

It is within the province and power of the court to set aside a verdict which does not reach a substantially just conclusion, when there is just ground for the relief that the jury acted through prejudice, passion, mistake, or any other cause which should not properly control them.

Where the Judge has declined to disturb the verdict of the jury, the presumption is that he exercised his discretion properly. It should be a very plain case to justify an appellate court in setting aside the concurrent conclusion of both court and jury, on the ground that their action was contrary to the evidence, or weight of evidence.

Where the court below gave credit to one witness, corroborated by another, rather than to two witnesses, who had sworn falsely to the incidents of the identical voyage, and to one, whose statements bore internal evidence of incorrectness, and refused to set aside the verdict of the jury, the case does does not require this court to set aside the action of both court and jury. Schultz vs. The Pacific Insurance Co..... 73

VERDICT—THE CONCURRENCE OF THE JURY—

The verdict that "We the jury find for the plaintiff, and assess the damage at six thousand dollars, with interest from the commencement of this suit at legal rate," expresses the conclusion of the jury with sufficient certainty to justify a judgment thereon. *Ibid* 74

After trial and verdict, without exceptions taken, and a refusal of new trial by the Court below, this Court will not interfere to disturb the verdict, if there is any evidence, though slight, to support it, and there is no ground to conclude that the jury were influenced by other considerations than the evidence. The verdict in the present case seems to be fully supported by the evidence. Moses vs. Gilchrist and Son..... 325

VESSELS—WARRANTY OF SEA WORTHINESS—

Where the proximate cause of a leak, discovered shortly after sailing, which resulted in the loss of the ship, cannot be traced to a peril insured against, or to stress of weather, or to some accident upon the voyage, a presumption of unseaworthiness, when the vessel sailed, should be generated in the minds of the jury, and the insurer should be discharged, unless this presumption is overcome by the insured. In order to create this presumption the burden of proof of these facts lies upon the insured.

It is a compliance with the warranty of seaworthiness, if the ship is in a suitable condition to carry the cargo put on board, or intended to be put on board.

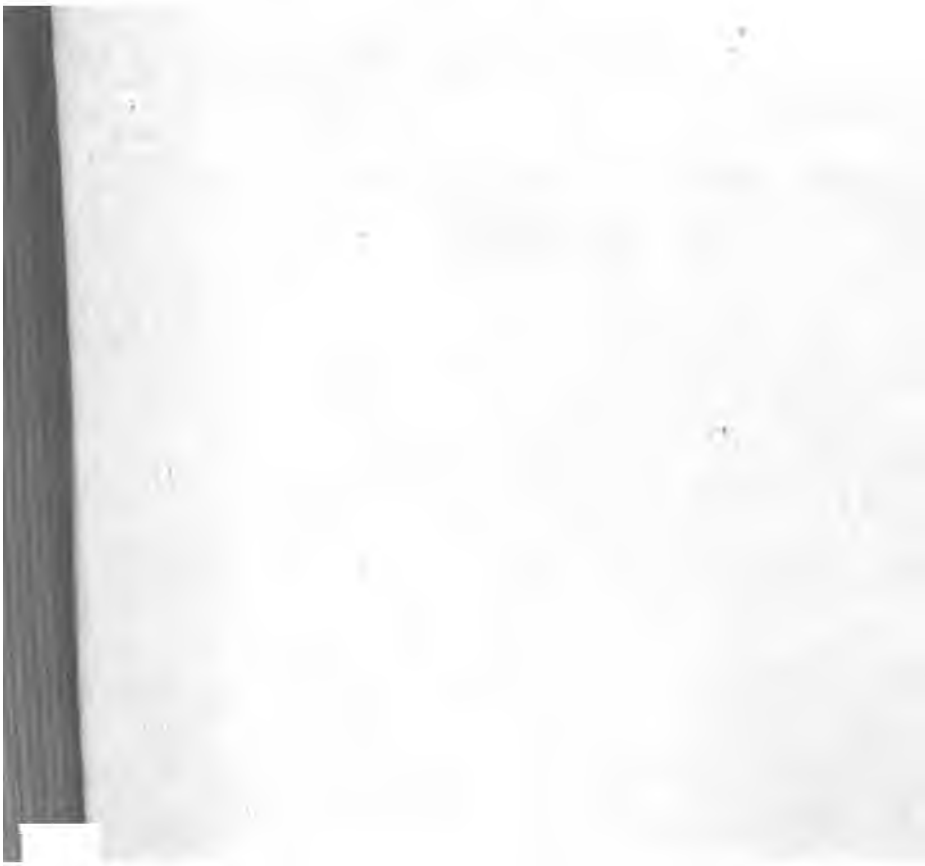
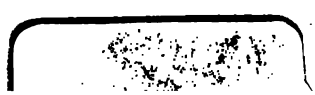
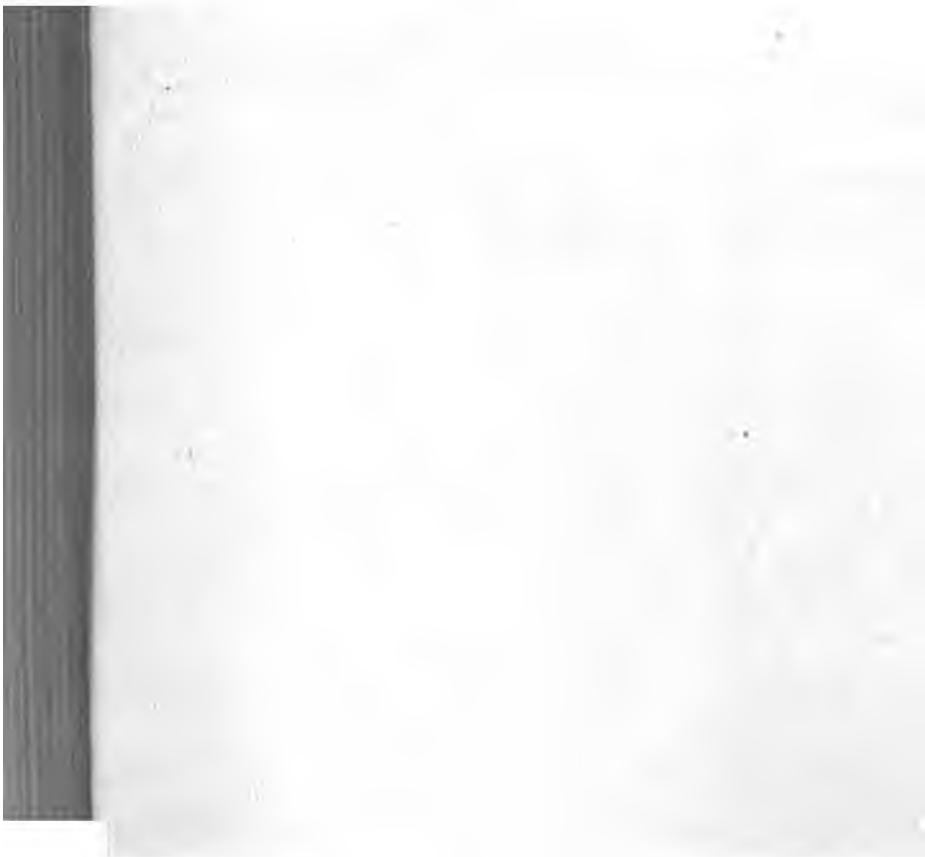
A necessary jettison, shortly after sailing with a proper load, without encountering a peril insured against, is a fact tending to generate a presumption of unseaworthiness. The burden is upon the defendant to prove that no peril was encountered, and the necessity of the jettison. Schultz vs. The Pacific Insurance Co..... 73

WARRANTY IMPLIED—

The implied warranty of seaworthiness requires from the insured such a degree of care in the selection of his officers and crew as is necessary to obtain competent persons and the principle extends to many other matters embraced in the contract. The burden of proof is here upon the underwriter. The presumption is with the insured after proof of loss. Ibid..... 74

WARRANTY NOT NECESSARY TO BE COMMUNICATED—

The insured is not obliged to communicate any fact, as to which there is a warranty, express or implied, unless information upon the subject is particularly called for in the first instance. *Ibid*..... 74

WITNESS—CREDIBILITY OF—

Where the question is purely as to the credibility of one of two witnesses, the verdict of the jury should not be set aside. Shaw vs. Newman 128